No. 14-14-00589-CV

In the Fourteenth Court of Appeals Houston, Texas

1717 BISSONNET, LLC,

Appellant/Cross-Appellee,

vs.

PENELOPE LOUGHHEAD, ET AL,

***Appellees/Cross-Appellants*.**

ON APPEAL FROM THE 157TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

CROSS-APPELLEE'S BRIEF

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ORAL ARGUMENT REQUESTED

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CROSS-APPELLEE'S BRIEF

1717 Bissonnet, LLC ("1717") files this cross-appellee's brief in support of the district court's denial of permanent injunctive relief.

I. RESPONSE TO PLAINTIFFS' STATEMENT OF THE CASE.

The Plaintiffs' statement of the case is incorrect in a few important respects. The jury did not find, as Plaintiffs assert, that the "Ashby High Rise" "*would* constitute a nuisance as to 20 of the 30 plaintiff households." *See* Cr-Appts' Br., at p. 1 (emphasis added). The jury found that "the Project," defined by the court's charge to mean the Project proposed *at the time of trial* (CR 732), will constitute a nuisance in some unspecified manner for 20 Plaintiff properties – *if built*. The jury was not asked to find whether the construction of *that* proposal was imminent, or whether *that* proposal would ever be built. The catch-phrase "Ashby High Rise" – which the

Plaintiffs request this Court to enjoin – is broader than the defined term "Project" and appears nowhere in the jury charge.

After the jury returned its verdict, 1717 modified its plans for the "Project" and demonstrated at the injunction hearing that the Project's foundation design had been enhanced to eliminate the risk of settlement damage to the Plaintiffs' slabs. The "Project" as defined by the charge will never be built.

The district court's memorandum order denying injunctive relief is based upon (1) grounds expressly discussed in the memorandum and (2) the grounds stated "in the defendant's trial brief on balancing the equities and defendant's other briefs." (CR 1206).[1] By adopting the reasons stated in 1717's trial briefing for denying the injunction, the district court, in addition to the express findings in its order, impliedly found that (1) the Project poses no threat of significant imminent harm, and (2) the Plaintiffs' challenge to the Project as proposed at the time of trial is moot. Plaintiffs have not appealed those implied findings and independent grounds for denying relief.

II. STATEMENT OF THE ISSUES.

Reply Point 1: The district court did not clearly abuse its discretion in denying a permanent injunction against the Project.

Cross-Point 1: The injunction was properly denied because the liability findings are unsupported by legally sufficient evidence. As a matter of law, the doctrine of strict liability (nuisance without fault) does not apply on this record.

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[1] *See also* CR 1199 ("For reasons stated here *and in defendant's opposition briefs*, plaintiffs' request for a permanent injunction is denied.") (emphasis added); CR 1215 ("For the reasons stated here, *and for the reasons stated in Defendant's briefing*, the application for injunction is denied.") (emphasis added).

Cross-Point 2: The Plaintiffs have waived their appeal by failing to brief two of the independently sufficient grounds implicitly relied upon by the district court for denying permanent injunctive relief – namely:

(1) The Project poses no threat of imminent harm to any of the Plaintiffs' properties; and

(2) The controversy is moot because 1717 has modified the design of the "Project" as defined by the jury charge.

Cross-Point 3: The district court's denial of injunctive relief should be affirmed because the Plaintiffs have failed to demonstrate conclusively that, absent such injunction, the prospective harm found by the jury is imminent and reasonably certain to occur.

Cross Point 4: The district court's denial of injunctive relief should be affirmed because 1717 has renounced its intention to build the "Project" as proposed at the time of trial, and the Plaintiffs failed to prove otherwise; thus, the injunctive relief sought is moot.

Cross-Point 5: The jury findings of damages in this case are unsupported by legally sufficient evidence. Thus, the damage awards do not show any harm to the Plaintiffs and cannot be factored into the balance of equities.

Cross-Point 6: The Plaintiffs cannot seek relief on appeal greater than that sought from the trial court. Thus, by failing to request the trial court to enjoin the "Ashby High Rise," Plaintiffs cannot obtain that relief from the Court of Appeals.

Cross-Point 7: Because Plaintiffs have not offered to remit their damage award, they have elected their damage remedy and are estopped by the final judgment to obtain a double recovery in the form of injunctive relief as well.

III. STATEMENT OF FACTS.

A. Scope of Injunction Sought.

On appeal, the Plaintiffs seek relief they did not seek in the trial court. On appeal, Plaintiffs request this Court to "permanently enjoin[ ] the Ashby High Rise." *See* Cr-Appts' Br., at p. 39. This appellate prayer is broader than the prayer of their live pleadings, which sought "a permanent injunction prohibiting the construction of the High Rise *at least in its current form* at the proposed site." [2]

Following the verdict, the Plaintiffs submitted a proposed form of injunction which would have prohibited 1717 "from constructing the proposed 21-story multi-use building on the property located at 1717 Bissonnet *that is permitted by the City of Houston*." (CR 1000) (emphasis added). In his order denying injunctive relief, Judge Wilson understood that the relief Plaintiffs sought was "an injunction precluding the defendant from constructing the Project *as permitted by the city*." (CR 1207) (emphasis added). In the jury charge, the term "Project" was defined to mean "the 21-story mixed-use building that 1717 Bissonnet proposes to construct." (CR 732). Plaintiffs did not request an injunction against high rises in general.

[2] (CR 432) (emphasis added). 1717 specially excepted to the prayer for injunctive relief as vague (CR 166), which the district court denied. (CR 190-91)

1717 will later discuss why the appellate relief sought by the Plaintiffs in this case cannot be reconciled with the usage of equity requiring that injunctions be "narrowly drawn and precise." *See infra*, at pp. 39-40. For now it will suffice to alert the Court to the patent disconnect between the relief sought below – aimed at the building *as permitted by the City* at the time of trial – and the thrust of one of their central arguments on cross-appeal. Here Plaintiffs have constructed an elaborate *ad hominem* attack against Mr. Morgan, one of 1717's principals, claiming that he has no intention of performing 1717's Settlement Agreement with the City. Putting aside the extensive controverting evidence which the trial judge had discretion to believe,[3] this argument is plainly a red herring. Plaintiffs did not seek an injunction to compel 1717 to live up to the promises it made in the Settlement Agreement (which Plaintiffs would lack standing to enforce in any event). They instead sought an injunction to prohibit 1717 from building the Project *as permitted by the Agreement*; that is, to prohibit the construction of the Project which the City of Houston has fully reviewed, permitted, and currently supports.[4]

There is no pleading or fact finding of "bad faith," "fraud in the inducement," or any of the other *ad hominem* attacks which the Plaintiffs seek to establish on appeal as a basis for

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[3] Messrs. Morgan and Kirton confirmed 1717's intent to perform the Settlement Agreement. (3 RR 166; 11 RR 148). No decision has been made on the type of green screen or the number of restaurants. (3 RR 160; 11 RR 163, 173-74; 12 RR 226-28). Mr. Morgan explained his email exchange about the foundation permit resubmittal within the context of the customary give-and-take between developers and city regulators. As Mr. Morgan explained, the developer submits a plan with the expectation that the City permit officials will provide feedback to guide future revisions of the plans that satisfy the City's concerns. (3 RR 168-79). *See also* Britt Perkins, 1717's design architect, commenting that the plans depicting multiple restaurants does not necessitate more than one restaurant, and confirming the intent to build only one restaurant. (12 RR 220-23).

[4] (CR 1180) (4/17/14 letter of then-City Attorney David Feldman).

shutting down the "Ashby High Rise." No evidence exists to show that the City of Houston will waive enforcement of the Agreement were 1717 to breach it.

B. The District Court's Interpretation of the Verdict.

The alleged prospective nuisance injuries in this case are not indivisible, as would be the case, for example, of a nighttime drag racing track operation, with roaring engines, glaring stadium lights, and cheering spectators, all caused by the same activity. Here, by contrast, each of the claimed prospective annoyances is causally distinct and analytically severable from the others. Increased traffic results from project density and road configuration, not building height. Foundation settlement results from the mass of the building, plasticity of the soil, and the foundation design. Any structure with windows above the fence line will offer views into a neighbor's backyard. Construction noise is inevitable with any construction. So is ambient light. The only claimed impact in this case that is directly related to proposed height of the building is the *length* of its shadow. Thus, the verdict that the "Project" will constitute a nuisance, if built, is not a finding that condemns all high rises in that location *per se*, much less a finding that condemns each of the challenged design features of this particular high rise Project.

In an effort to bolster the vague, ambiguous jury findings, the Plaintiffs have selectively presented evidence that reflects their best case, as if the lower court and the Court of Appeals must assume that the general verdict subsumes subsidiary findings on each of the causally severable harms tried to the jury. The general verdict, however, is not necessarily synonymous with the evidence viewed in a light most favorable to the Plaintiffs. Interpreting a jury finding

is not the same as determining whether the evidence is legally sufficient to support it. In his order denying injunctive relief, the trial judge correctly noted that "it's not possible to know precisely what the jury was thinking."[5]

On each of the Plaintiffs' theories of harm, the evidence was hotly contested.[6] The jury charge defined "nuisance" leniently, to include interference that merely amounts to "more than a *slight* inconvenience or *petty* annoyance."[7] Plaintiffs' counsel emphasized this lenient standard to the jury during his closing argument:

> [A]ll it has to be is more than a slight inconvenience or a petty annoyance. That's the law. That's the standard. It just has to be more than that.[8]

The verdict does not say which, if any, of the claimed future impacts satisfy this lenient threshold. Nor does the verdict say anything about the severity of any such future impact, except that the interference will exceed a "slight" or "petty" annoyance if the "Project" is built. Thus, the verdict provides no basis on which a court can isolate the offending features and limit any injunction to prohibiting those.

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[5] CR 1207.

[6] *See* Mr. Vogt's testimony that the high rise would not damage surrounding foundations (10 RR 28-30, 38-40); Mr. Lynch opining that the Project will not significantly increase traffic, even if assuming 184 trips (12 RR 21-22, 66-68); Mr. Steitle opining that cues will not form on Bissonnet (12 RR 82-102); Mr. Bos opining that direct light from the garage would not be visible and that ambient light would not disturb sleep (12 RR 140-51, 163-64); Ms. Cita's testimony opining that plants can grow in shadow (12 RR 195-98); Mr. Perkins, the design architect, discussing the difficulty of using various vantage-points in the building to spy on neighbors (12 RR 208-13).

[7] CR 733 (emphasis added).

[8] 15 RR 112.

During closing argument, the trial judge bemoaned the dilemma posed by the spaghetti bowl verdict. That the undifferentiated "Project" was found to be a nuisance if built presented the court with an "all-or-nothing" injunction proposal – either prohibit literally everything permitted and agreed upon by the City in the Settlement Agreement, down to the last nut, bolt, or paint color, or prohibit nothing.[9] Judge Wilson's own statements on the record best describe the administrative tar baby posed by the injunction Plaintiffs had requested:

> I've got this finding by the jury that the project taken as a whole would constitute a nuisance to 20 or 30 homeowners and with just the slightest tweaking, . . . they [the developers] can do something that would not violate the injunction and then it's back to the races we go again for another trial, another jury, and another finding whether this constitutes a nuisance."[10]

To make sense of and assign comparative weight to the jury's nuisance findings, the district court correctly interpreted the verdict as a whole, in light of the evidence. From a comparison of the liability and non-liability findings, it was obvious that proximity was a key factor.[11] No plaintiff more than 200 feet from the Project had won. In addition, no property north of the Project – even those in relatively close proximity – had won. [12]

The court drew reasonable inferences from these comparisons. The property with the greatest shadow coverage – 1810 Bissonnet, almost directly across Bissonnet from the Project

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[9] 18 RR 36.

[10] 18 RR 37.

[11] CR 1207.

[12] *Id.*

site – had lost the verdict.[13] Shadow, therefore, carried little weight with the jury. Traffic, too, must have carried little weight, as none of the residents with egress and ingress on Bissonnet or Dunlavy – the epicenter of the alleged Project-related traffic jams – had won the verdict.[14] Summarizing these conclusions, the district court observed that "even plaintiffs' counsel at closing arguments [had] conceded that this finding suggests that the jury rejected the traffic and shadow concerns raised by the plaintiffs."[15]

In addition to discounting traffic and shadow concerns, the district court also ruled out the Plaintiffs' privacy concerns, apparently as a matter of law:

> One of the plaintiffs' concerns is that the Project, if it went forward, would permit an invasion of privacy into the plaintiffs' homes and back yards. This is a fact of life in urban settings. Any time a two story home is erected next door, the new neighbors will have an opportunity to peer into your back yard.[16]

A comparative analysis of the damage findings also yields important insights into the meaning of the general verdict. According to the district court, "the jury determined that the prevailing plaintiffs' homes would be diminished in value by ranges of 3-15%."[17] Although the jury had no evidence on which to postulate these ranges,[18] the ranges themselves are a rough

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[13] *See* Grossman's opinions on shadow coverage at 1810 Bissonnet (4 RR 131-33; PX 346, at P # 21); and Plaintiff Clark's testimony that his property will be more impacted by shadow than the others. 7 RR 226.

[14] Perhaps the most compelling example is the jury's refusal to find liability in favor of Plaintiff Graves, at 5219 Dunlavy and the corner of Bissonnet. 5 RR 181-93.

[15] CR 1207.

[16] CR 1213.

[17] CR 1214 (citing DX 166).

[18] *See* 1717's Appt's Br., at pp. 26-29.

proxy of the jury's belief about the severity of any future nuisance. Importantly, the jury refused to find market value damages in the 12% to 19% range suggested by the Plaintiffs' appraiser, thus signaling the jury's rejection of the worst case scenario forecast by the Plaintiffs' liability experts. Properties in the area of "severe to very severe" foundation damage (as forecast by Mr. Ellman) received the highest lost market value awards – a 15% reduction.[19] With one exception, the area projected by Mr. Ellman to experience "moderate" foundation damage was awarded market value diminution awards of 12%.[20] For homes outside of the area of anticipated foundation damage, the lost market value awards dropped off sharply. Two of the prevailing properties on the west side of the Project (1801 Bissonnet and 1804 Wroxton Road) received damages representing a 5% reduction in value.[21] All other prevailing properties received awards representing a 3% reduction.[22]

In summary, while these inferences from the verdict are no substitute for actual findings and should not be treated as subsidiary findings, the verdict as a whole does suggest that the prospect of foundation damage is what most concerned the jury. Traffic and shadow were of little or no concern, and, as the trial court concluded, the privacy concerns were legally

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[19] *See* Damage Findings for Van Dyke (# 2(9)), Miller (# 2(10)), Zhang (# 2(11)); and Gariepy (# 2(12)); *see also* Mr. Spilker's valuations for these properties which assumes that the tower project had not been permitted. PX 272, 274, 275, 277.

[20] *See* Damage Findings for Bell (# 2(7)), Meis (# 2(8)), Flatt (# 2(3)), Loughhead (# 2(4)), Verplanken (# 2(5)), Rund (# 2(6)); PX 270, 271, 280, 283, 285. The exception is 1750 Wroxton Court, which is in the zone of "moderate" foundation damage and yet received damages representing a 15% reduction. *See* Jury Finding # 2(1); PX 286.

[21] *See* Damage Findings for Lam Nguyen (#2(2)), and Roberts (#2(13)); PX 263, 288.

[22] *See* Damage Findings for Powell (# 2(14)), Jennings (# 2(15)), Clifton (# 2(16)), Bell (# 2(17)), Baraniuk (# 2(18)), Reusser (# 2(20)), and Martin (# 2(24)); PX 273, 277, 279, 281, 282, 287, 290.

insubstantial. The remaining damages are relatively small (3% to 5%), and it is impossible to deduce which of the harms may have factored into those jury findings.

C. The March 31, 2014, Injunction Hearing.

During the March 31, 2014, injunction hearing, 1717 offered evidence to prove three essential facts pertaining to the Plaintiffs' request to enjoin the Project as then proposed:

(1) design enhancements that would eliminate the threat of foundation damage and mitigate light and privacy concerns,

(2) harm posed by the injunction to the Defendant, and

(3) harm posed by the injunction to the public.

The evidence on each of these topics will be summarized in turn below.

1. Design Enhancements.

Between the time of the verdict and the injunction hearing, 1717 materially enhanced the design of the Project, such that it was no longer the same "Project" as defined by the charge. To reduce spill lighting from the garage, 1717 will add screening and motion sensors to deactivate lights when the garage is not being used.[23] To prevent users of the amenity deck from looking over the parapet and into backyards of the adjoining properties, 1717 will add planters along the wall that will impede access.[24]

Most importantly, 1717 modified the foundation design to prevent settlement and foundation damage to abutting properties – the potential harm that seemed to most concern the jury. The solution to the foundation problem, which was based on data obtained in the

[23] 17 RR 76-77; DX 165.

[24] 17 RR 79.

November 2013 bore sampling,[25] is simple. Consistent with the soil configurations of the Houston area, the boring revealed a permanent, non-compressible sand layer situated approximately 110 feet below the surface.[26] Extending the piles of the foundation into the sand will support the weight of the building and eliminate any threat of differential settlement, even if Mr. Ellman's assumptions about the plasticity of the overlying clay formations are assumed to be true.[27] With this information, 1717 modified its foundation design to lengthen 71 of the auger-cast piles underneath the two main shear wall boxes at the southwest and southeast corners of the garage, so that their tips will extend at least two feet into the hard sand.[28] The estimated cost to enhance the foundation in this manner – $50,000 – is minuscule in relation to overall construction costs.[29] None of this evidence was controverted at the injunction hearing, and unsurprisingly, it goes unmentioned in the cross-appellants' brief.

During closing argument, the trial judge requested a letter confirming 1717's intent to implement these three design changes.[30] Such letter was furnished to the court on April 21, 2014.[31]

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[25] In their brief, the Plaintiffs attempt to spin the 2012 boring data as an ambush. It was not. Under TEX. R. CIV. P. 196, Plaintiffs could have conducted their own borings. Apparently for tactical reasons, Plaintiffs chose not to perform any tests of their own. 10 RR 188.

[26] 10 RR 56-57, 64; 17 RR 113, 122-23; DX 142.

[27] 17 RR 112-24.

[28] 17 RR 74-76.

[29] 17 RR 76.

[30] 18 RR 68-69.

[31] CR 1182-83.

2. Harm to 1717.

1717 proved that it would sustain significant losses if the Project (now as modified) were enjoined. By March 31, 2014, 1717 had invested **$14,733,945.11** in the Project, including fees for architectural drawings, for engineering work, entitlement costs, permitting fees, and other pursuit costs.[32] Although the land can be sold, millions in sunk costs would be lost if the Project were enjoined. To the extent an injunction necessitated a redesign of the Project, delay damages would approximate **$750,000.00 per month**.[33] Conversely, the Project is expected to net **$72,000,000.00** in profit if not enjoined.[34]

3. Harm to the Public.

If not enjoined, the building will provide 232 high quality residences for persons who might desire to live in this specific area of the City.[35] It will offer a housing option and lifestyle that does not presently exist in that area.[36] Construction of the building will add 2000 to 2800 jobs to Houston's economy.[37] Based on a conservative valuation of $66,000,000, the modified Project owner will pay $1,700,000 in ad valorem taxes every year.[38] If granted, however, the

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[32] 17 RR 56-59, 64, 102-04, 132-33; DX 160-64.

[33] 17 RR 143-48.

[34] 17 RR 61-64.

[35] 10 RR 200.

[36] 17 RR 107-08.

[37] 17 RR 71.

[38] 17 RR 66.

proposed injunction would not only nullify these public benefits but would also be perceived by the investing community as a harbinger of unpredictability.[39]

D. Grounds for Denying the Requested Injunction.

In his order denying injunctive relief, Judge Wilson identified and explained several of the reasons that underlie his decision. He also adopted all of the "reasons stated in the defendant's trial brief on balancing the equities and defendant's other briefs."[40]

1717's trial brief (CR 790-824 (**Appendix 1**)) asserts, *inter alia*, that the "Project" has been materially modified, and thus, the claimed prospective harm from the "Project" will not occur. The "Project" – as globally defined by the charge to mean the design proposal at the time of trial – will not be built. The feared harm from that "Project" proposal is no longer imminent, and thus, the Plaintiffs' requested injunction is moot.[41]

One of "defendant's other briefs"[42] referenced in the district court's May 1, 2014, order is an April 17, 2014, trial brief on issues raised at the March 31, 2014, injunction hearing. (CR 1141-52) (**Appendix 2**). The April 17 trial brief again argues that 1717 "proved at the March 31 hearing [that] the original proposal has been modified to address foundation, garage lighting,

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[39] 17 RR 131-43, 148-49 (testimony of Gary Sapp, Executive VP of Hunt Development Group).

[40] CR 1206 (noting that only "some of the reasons to deny the application are discussed here"); *see also* CR 1199, 1215.

[41] CR 791-93.

[42] The remaining "other briefs" are defense counsel's April 21, 2014, letter brief confirming 1717's intent to follow through with the design changes that Mr. Kirton testified about during the injunction hearing (CR 1182-83) (**Appendix 3**); defense counsel's April 22, 2014, letter brief responding to the Plaintiffs' contention that the prospective nuisance was *per se* irremediable at law with a damage recovery (CR 191-95) (**Appendix 4**); and defense counsel's April 23, 2014, letter brief responding to post-hearing briefing by the Plaintiffs. (CR 1196-97) (**Appendix 5**).

and potential vantage points from the amenity deck. The prospective harms tried to the jury are no longer imminent."[43] The April 17 brief also argued that Plaintiffs' "proposed injunction is hopelessly unclear and potentially enjoins lawful activities."[44]

IV. SUMMARY OF ARGUMENT.

This applicable standard of appellate review places an insuperable burden on the Plaintiffs. Because the remedy Plaintiffs seek consists only of a reversal and rendition of an injunction, they must not only show the trial judge committed a clear abuse of discretion; they must further demonstrate that the trial court had no discretion but to issue the omnibus injunction for which they have prayed. Plaintiffs' cross-appeal fails to satisfy this heavy burden.

The district court's denial of injunctive relief can be affirmed on any of several independent grounds.

None of the *Jim Rutherford* elements for a permanent injunction exist:

(1) *No Legal Harm* – The liability findings are unsupported by legally sufficient evidence, and therefore, there is no valid finding that the "Project" will be a nuisance, if built.

(2) *No Imminent Harm* – On appeal, the Plaintiffs have not demonstrated that the "Project" as proposed at the time of trial will in fact be built. Indeed, the trial court implicitly decided that issue against them on the basis of undisputed evidence that the plans of the Project were

[43] CR 1146.

[44] CR 1147-48.

modified to prevent any risk of foundation damage and to further buffer the surrounding residences from other potential annoyances. There is no argument in Plaintiffs' brief to show how the trial court's decision on that essential element of their claim was error. Failure to brief that essential element waived any complaint on appeal.

(3) *No Irreparable Harm*. The trial judge correctly noted that even if the foundations of the surrounding homes were later damaged by the building – which they will not – such damage is not irreparable but can be adequately compensated later by damages.

The trial court's balance of the equities also supports the denial of injunctive relief. Plaintiffs' appellate burden was to show a clear abuse of discretion in the application of this balancing analysis, which Plaintiffs have failed to do. Texas courts have repeatedly rejected their main legal argument on appeal – that whenever a nuisance disturbs the use and enjoyment of a home, the harm to the plaintiff necessarily outweighs all other harms. Here, the potential harm to the Plaintiffs of denying the injunction is slight at most, whereas the harms of granting the injunction will be Defendant's loss of millions of dollars of sunk investments, millions more in tax revenues lost to the public, prime living space convenient to the Medical Center, and over 2000 new jobs for the local economy.

Finally, the injunction requested at trial was properly denied both because it was overly broad and because of the inherent difficulties of administering it. Enjoining "the Project" would relegate the trial judge to the role of a one-man zoning board of adjustment.

V. ARGUMENT.

A. Essential Elements for Permanent Injunctions.

Ordinarily, a court can grant injunctive relief only when the movant has proven:

(1) the existence of a wrongful act;

(2) the existence of imminent harm;

(3) the existence of irreparable injury; and

(4) the absence of a remedy at law.

Jim Rutherford Invs., Inc. v. Terramar Beach Community Ass'n, 25 S.W.3d 845, 848 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

This is not an ordinary injunction case because, currently, no "wrongful act" yet exists, so, literally speaking, element (1) of the *Jim Rutherford* test does not apply. This is a suit to enjoin an *anticipatory* nuisance – a proposed building which, if later built, will (according to the jury) constitute a nuisance for twenty of the plaintiff properties.

In a nuisance-in-fact case, there is also a fifth element – the court must weigh the competing equities, including the public interest, and determine whether the equities weigh in favor of granting an injunction. *See, e.g., Storey v. Central Hide & Rendering Co.*, 148 Tex. 509, 226 S.W.2d 615, 618-19 (1950).

Finally, "[i]n order to warrant a court of equity to grant injunctive relief, the applicant must specify the precise relief sought," and "a court is without jurisdiction to grant relief beyond and in addition to that particularly specified." *Fairfield v. Stonehenge Asso.*, 678 S.W.2d 608, 611 (Tex. App.—Houston [14th Dist.] 1984, no writ); *see also Hues v. Warren Petroleum Co.*,

814 S.W.2d 526, 529-30 (Tex. App.—Houston [14th Dist.] 1991, writ denied); TEX. R. CIV. P. 683. "Permanent injunctions 'must be narrowly drawn and precise.'" *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 287 (Tex. 2004) (quoting *Holubec v. Brandenberger*, 111 S.W.3d 32, 40 (Tex. 2003)). An injunction cannot be drawn "so broad as to enjoin a defendant from activities which are a lawful and proper exercise of his rights." *Holubec*, 111 S.W.3d at 40; *see also Villalobos v. Holguin*, 146 Tex. 474, 208 S.W.2d 871, 875 (1948) (same); *Scoggins v. Cameron County Water Imp. Dist. No. 15*, 264 S.W.2d 169, 173 (Tex. Civ. App.—Austin 1954, writ ref'd).

B. Standard of Review.

Plaintiffs request an all-or-nothing appellate outcome – reverse the trial court's denial of injunctive relief and issue a judgment permanently enjoining the Ashby High Rise. Nothing else is sought. Accordingly, it will not suffice in this appeal to show merely that the district court's analysis is flawed in some immaterial respect. Rather, to receive the injunction they seek from this Court, Plaintiffs needed to demonstrate on appeal that the trial judge, on this record, had no discretion but to grant that injunction. The ultimate issue is "whether the trial court could have come to only one decision" – that being the injunction prayed for here on appeal. *Fort Bend County Wrecker Ass'n v. Wright*, 39 S.W.3d 421, 425 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Plaintiffs have acknowledged, as they must, that the refusal of a permanent injunction is "within the trial court's sound discretion, and on appeal, review of the trial court's action is limited to the question of whether the action constituted a clear abuse of discretion." *GTE*

Mobilnet of S. Texas Ltd. Pshp. v. Pascouet, 61 S.W.3d 599, 620 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Jim Rutherford*, 25 S.W.3d at 848. Although it is true that the ultimate issues of fact are submitted for jury determination, the jury does not determine the "expediency, necessity, or propriety of equitable relief." The trial judge does. *State v. Texas Pet Foods, Inc*., 591 S.W.2d 800, 803 (Tex. 1979).

With respect to the jury's liability verdict in this case, two standards of review apply. Each is briefly discussed in turn below.

First is 1717's challenge to the legal sufficiency of the evidence supporting the verdict. A legal sufficiency challenge is reviewed under the familiar no-evidence review standard – the jury's verdict must be disregarded where (1) there is a complete absence of evidence of a vital fact; (2) rules of law or evidence preclude the fact-finder from giving any weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

Second is the Plaintiffs' challenge to the trial court's interpretation of the vague, ambiguous jury findings. "If the jury findings are ambiguous or unclear, the appellate courts must try to interpret the findings so as to uphold the judgment." *Daneshjou v. Bateman*, 396 S.W.3d 112, 115 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (Christopher, J.) (plurality op.) (quoting *Jackson v. U.S. Fid. & Guar. Co*., 689 S.W.2d 408, 410 (Tex. 1985)); *see also W & F Transp., Inc. v. Wilhelm*, 208 S.W.3d 32, 44 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

The trial judge's determination about the "the expediency, necessity, or propriety" of equitable relief must be reviewed for an abuse of discretion. *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 428-29 (Tex. 2008). "A trial court abuses its discretion by (1) acting arbitrarily and unreasonably, without reference to guiding rules or principles, or (2) misapplying the law to the established facts of the case. *Triantaphyllis v. Gamble*, 93 S.W.3d 398, 402 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex. 1985)).

Where, as here, "part of a cause is decided by a jury and part by the court, the party appealing the court-decided issue should request findings of fact and conclusions of law." *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc*., 937 S.W.2d 60, 82 (Tex. App.—Houston [14th Dist.] 1996), *aff'd as modified*, 975 S.W.2d 546 (1998). In this case, neither party requested findings of fact or conclusions of law under Rule 296. Accordingly, "[i]t is presumed that all fact findings needed to support the judgment were made by the trial judge." *Smith v. Smith*, 22 S.W.3d 140, 149 (Tex. App.—Houston [14th Dist.] 2000) (citing *Carter v. William Sommerville and Son, Inc*., 584 S.W.2d 274, 276 (Tex. 1976)); *see also Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003) (applying TEX. R. CIV. P. 299 to supply omitted findings in context of claim for injunctive relief); *Beauty Elite Group, Inc. v. Palchick*, No. 14-07-00058-CV, 2008 Tex. App. LEXIS 1918, *8 (Tex. App.—Houston [14th Dist.] Mar. 18, 2008, no pet.) (mem. op.) (affirming denial of injunction on the ground that there was "sufficient evidence in the record to support additional implied findings in conformity with the trial court's judgment denying injunctive relief on grounds that

the record fails to demonstrate imminent harm, irreparable injury, or any damage for which there is no remedy at law").

On the equitable elements, the trial court's fact findings are reviewed under the same legal sufficiency standard as jury findings. *Triantaphyllis*, 93 S.W.3d at 402. An appellant may challenge implied findings by contesting the legal sufficiency of the evidence to support them. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Forscan Corp. v. Dresser Indus. Inc.*, 789 S.W.2d 389, 394 (Tex. App—Houston [14th Dist.] 1990, writ denied). "The trial court does not abuse its discretion when its decision is based on conflicting evidence and some evidence in the record reasonably supports the trial court's decision." *8100 N. Freeway, Ltd. v. City of Houston*, 363 S.W.3d 849, 854 (Tex. App.—Houston 14th Dist. 2012, no pet.) (citing *Triantaphyllis*, 93 S.W.3d at 402).

C. The Project Will Not Constitute a Nuisance, Even If Built.

Plaintiffs deserve no injunction because liability has not been validity established. As fully discussed in 1717's appellant's brief (*see* pp. 29-50), the liability findings (Question 1) do not support an award of damages. For many of the same reasons, those findings cannot support an injunction, either – for any of the Plaintiffs.

As to all Plaintiffs, the culpability finding ("abnormal and out of place") is legally immaterial in this context. *See City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997) (strict nuisance liability applies to activities "abnormal" and "out of place" within the doctrine of *Rylands v. Fletcher*). No evidence exists to prove that the Project as a whole, or that any specific design feature of the Project, will constitute "abnormal and out of place" conduct in the

legally relevant sense – that the Project is both unusual and distinctively dangerous in its unusualness.

As also discussed in 1717's appellant's brief (pp. 43-50), no evidence supports a finding that the Project, if built, will cause any substantial interference with the use and enjoyment of the non-abutting Plaintiffs' properties. Those same arguments apply to all Plaintiffs to the extent an injunction is sought to prevent a shadow from being cast by the building (*see Klein v. Gehrung*, 25 Tex. 232 (Tex. 1860)), or increased traffic on neighborhood public streets (*City of San Antonio v. Stumburg*, 70 Tex. 366, 7 S.W. 754, 755 (1888), or ambient garage lighting, views from above, construction noise, etc. 1717 also adopts the argument in its appellant's brief (p. 43), that there are no pleadings that any light or construction-related annoyances will amount to a nuisance. The lack of pleadings defeats the claim to enjoin the Project in order to prevent those alleged annoyances. *See* TEX. R. CIV. P. 301.

D. The "Project" as Defined by the Charge Will Not Be Built.

The party seeking an injunction must establish that the defendant "will engage in the activity enjoined." *State v. Morales*, 869 S.W.2d 941, 946 (Tex. 1994). "[T]he question of whether imminent harm exists to warrant injunctive relief is a legal question for the court, not a factual question for the jury." *Operation Rescue-National v. Planned Parenthood*, 975 S.W.2d 546, 554 (Tex. 1998). The threat must be *reasonably certain* to materialize if not prospectively enjoined. *See, e.g., Waggoner v. Floral Heights Baptist Church*, 116 Tex. 187, 288 S.W. 129, 131 (1926) ("no injunction will be issued in advance of the structure unless it *be certain* the same will constitute a nuisance") (emphasis added); *see also Dunn v. City of Austin*,

77 Tex. 139, 11 S.W. 1125, 1127 (1889) (affirming dismissal of claim that proposed cemetery expansion would, upon completion, create a nuisance for plaintiff homeowners and stating: "The inquiry in this case is, does the petition allege the existence of such *facts as shown with reasonable certainty* that a nuisance will be brought into existence, and that the petitioners and those whom they assume to represent will suffer injury thereby unless the relief prayed for is granted?") (emphasis added).[45]

The jury's finding – that the "Project", if built, will constitute a nuisance – is not a finding that *that* Project will ever be built. In fact, it will not. Following the verdict, 1717 materially modified the design of the "Project" proposed at the time of the verdict by (1) extending the length of the proposed piers to rest on a stratum of compacted sand that will completely eliminate the risk of settlement predicted by Mr. Ellman, (2) adding screening materials and motion sensors to the garage design, to further mitigate spill light from the garage, and (3) adding landscaping to the sixth floor amenity deck, to block the view from the amenity deck into the surrounding backyards.[46]

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[45] *See also McAshan v. River Oaks Country Club*, 646 S.W.2d 516, 518 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) ("Before the construction and operation of the parking lot could properly be enjoined, as a nuisance, it was the McAshans' burden to show that River Oaks' use of the parking lot would create a nuisance per se or that its proposed use *would necessarily* create a nuisance. The evidence regarding the proposed use of the parking lot was not such as would compel a finding that such use would *necessarily* create a nuisance.") (internal citation omitted; emphasis added); *Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 216 (Tex. App.—Houston [14th Dist.] 1989, writ denied) ("When an attempt is made to enjoin an anticipated nuisance, *the threatened injury must not be merely probable but reasonably certain before a court will exercise its equitable power to restrain it.*") (emphasis added).

[46] 17 RR 74-79.

Therefore, the current construction plans are not the same "Project" found by the jury to be a nuisance if built. Here it is worthwhile again to point out the obvious. No nuisance in fact yet exists. Plaintiffs seek to enjoin a project in its planning stages from ever coming into existence. The plans, however, continue to evolve. As the owner, 1717 is always free to modify its plan to develop its land.

Accordingly, in response to the Plaintiffs' motion for permanent injunction, 1717 contended that "since the prospective harm of the Project as proposed at the time of trial is no longer imminent, an injunction to enjoin the Project as it was then proposed is moot."[47] The trial court implicitly adopted these grounds by expressly adopting all of the grounds on which 1717 urged the court to deny the injunction.[48]

On cross-appeal, Plaintiffs have failed to brief whether the trial court abused its discretion in determining that (1) no imminent harm exists, and (2) the controversy relating to the Project as defined by the charge is moot. These omissions are fatal to their appeal. "When a separate and independent ground that supports a judgment is not challenged on appeal, the appellate court must affirm." *See Harris v. General Motors Corp.*, 924 S.W.2d 187, 188 (Tex. App.—San Antonio 1996, writ denied). Failure to complain of that ground for the judgment waives any error. *See Pitman v. Lightfoot*, 937 S.W.2d 496, 521 (Tex. App.—San Antonio 1996, writ denied).[49]

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[47] CR 819-20; *see also* CR 1146.

[48] CR 1199, 1206, 1215.

[49] *See also Smith v. Hennington*, 249 S.W.3d 600, 605 (Tex. App.—Eastland 2008, pet. denied) (same); *Herszage v. Herszage*, No. 13-06-257-CV, 2007 Tex. App. LEXIS 6548, at *22-23 (Tex. App.—Corpus

Because in this appeal the Plaintiffs have requested only the rendition of an appellate injunction in their favor, it was their burden on appeal to show that all of the elements of injunctive relief were established *as a matter of law*, including the element of imminent harm. Not only have Plaintiffs failed to show imminent harm conclusively; there is legally sufficient evidence of no imminent harm.[50] *See GTE Mobilnet*, 61 S.W.3d at 621 (denial of injunctive relief affirmed where substantial evidence supported trial court's conclusion that defendant had mitigated the threat of imminent harm from the common-law nuisance found by jury).

E. The Project Will Not Inflict Any Irreparable Harm.

As the Supreme Court has reiterated in a recent nuisance case:

> [A] permanent injunction issues only if a party does not have an adequate legal remedy. If there is a legal remedy (normally monetary damages), then a party cannot get an injunction too.

Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d at 287 & n.101(internal footnote omitted) (citing *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 & n.5 (Tex. 2001) (citing *Powers v. Temple Trust Co.*, 124 Tex. 440, 78 S.W.2d 951, 953-955 (Tex. Comm'n App. 1935, opinion adopted)).[51]

Christi Aug. 16, 2007, no pet.) (mem. op.) (same); *N.K. Res., Inc. v. Durham*, No. 01-06-00904-CV, 2007 Tex. App. LEXIS 5268, at *2-3 (Tex. App.—Houston [1st Dist.] July 6 2007, pet. denied) (mem. op.) (same).

[50] 17 RR 74-79; 18 RR 68-69; CR 1182-83.

[51] *See also Parks v. U.S. Home Corp.*, 652 S.W.2d 479, 485 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd) (even where real property is concerned, plaintiff must demonstrate that an action for damages is an inadequate remedy).

Whether a damages remedy is inadequate is intertwined with the issue whether an injury is irreparable. *Wright v. Sport Supply Group, Inc*., 137 S.W.3d 289, 294 (Tex. App.—Beaumont 2004, no pet.). An injury is "irreparable" only if it cannot be undone through monetary remedies. *Parkem Indus. Servs., Inc. v. Garton*, 619 S.W.2d 428, 430 (Tex. Civ. App.—Amarillo 1981, no writ). This is a question for the court to decide, not the jury. *See Baucum v. Texam Oil Corp*., 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.). "The party requesting the injunction has the burden of negating the existence of adequate legal remedies." *Hancock v. Bradshaw*, 350 S.W.2d 955, 957 (Tex. Civ. App.—Amarillo 1961, no writ).

The trial court correctly found that the harm anticipated by the Plaintiffs could be adequately remedied through damages – if any such harm ever occurs.[52] 1717 will carry insurance to cover property damage, and, in any event, 1717 has the financial wherewithal to pay damages if later awarded.[53]

On cross-appeal, Plaintiffs have made two related arguments. First, they contend that "threatened harm to real property" is "irreparable" as a matter of law. *See* Cr.-Appts' Br., at 38 (citing TEX. CIV. PRAC. & REM. CODE § 65.011(5) and *Stein v. Killough*, 53 S.W.3d 36, 40 (Tex. App.—San Antonio 2001, no pet.). Second, and more specifically, they contend that a nuisance is irreparable *per se* if it interferes with the enjoyment of a home. *Id*., at p. 38.

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[52] CR 1214.

[53] 17 RR 150-51.

Texas courts have rejected both arguments. As the district court correctly held, "the irreparable injury requirement still exists" as to real estate generally. (CR 1214, n.10) (citing *Sonwalkar v. St. Lukes Sugar Land Partnership*, LLP, 394 S.W.3d 36, 40 (Tex. App.— San Antonio 2001, no pet.)). Section 65.011(5) plainly requires a showing of "irreparable injury." Furthermore, Texas courts have construed Section 65.001(5) as preserving the rule of equity that injunctions may be granted only if legal remedies are inadequate. *Sonwalkar, supra* (citing *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 & n.5 (Tex. 2001) (citing *Powers v. Temple Trust Co.*, 124 Tex. 440, 78 S.W.2d 951, 953-955 (Tex. Comm'n App. 1935, opinion adopted)). If damages are an adequate remedy – as Judge Wilson found to be the case here – then there is no irreparable injury.

Texas courts have also rejected the argument that a nuisance affecting a residence is *per se* irreparable harm. In *Storey v. Central Hide & Rendering Co.*, the Supreme Court addressed whether homeowners were entitled to an injunction to enjoin the operation of a nearby hide rendering plant. On the basis of a verdict finding the rendering plant a nuisance, the trial court permanently enjoined the business. *Id.*, 226 S.W.2d at 617. In a split decision, a majority of the appeals court dissolved the injunction, concluding that "appellees are not entitled under the facts and circumstances of this case to a permanent injunction prohibiting the operation of appellant's rendering plant *for the reason that they have an adequate legal remedy for damages*." *Central Hide & Rendering Co. v. Storey*, 223 S.W.2d 81, 83 (Tex. Civ.

App.—Texarkana 1949) (emphasis added), *aff'd*, 148 Tex. 509, 226 S.W.2d 615 (1950).[54] This holding was approved by the Supreme Court. *Storey*, 226 S.W.2d at 618 ("we believe the Court of Civil Appeals majority opinion has correctly disposed of this cause").

In *Storey*, the Supreme Court stressed the fact that the nuisance found by the jury would not destroy the plaintiffs' homes. *Id*. at 617. Similarly here, the Plaintiffs failed to offer any evidence, much less persuade the trial court, that any nuisance later caused by the planned high rise would destroy their homes, render them unsafe for living in, or so disrupt their enjoyment of their homes that reasonable persons would feel compelled to leave.

In their brief, Plaintiffs point only to Mr. Ellman's opinion that the foundation damage he predicts will be slow moving and, in some cases, severe. *See* Cr.-Appts' Br., at 38. The trial judge, however, was not bound to accept Mr. Ellman's worst-case scenario. The verdict says nothing about the severity of any future foundation damage. Nor did Judge Wilson make his own findings as to the severity of foundation damage. Accordingly, this Court must presume that the trial court assessed the potential for foundation damage at a level consistent with the denial of injunctive relief.

The evidence supports an implied finding of slight or even no harm. Mr. Vogt contradicted the lynchpin of Mr. Ellman's damage analysis with testimony that the clay

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[54] A dissenting justice would have affirmed the injunction because of the severity of disruption posed by the rendering plant to the plaintiffs' residential use and enjoyment. *Id*. at 83-84 (Hall, J., dissenting). Justice Hall noted that "terrible stench and foul odors emanated from appellant's rendering plant, and entered appellees' homes which made them uninhabitable," and that "[t]he injury to appellees' health or the danger of some injury thereto and the deprivation of the use of their homesteads constitutes an irreparable injury." *Id*. No evidence exists in the present case, much less conclusive evidence, to prove a severity of harm even remotely approaching the harm posed by the rendering plant in *Storey*.

formations beneath the project site are of the same low plasticity common to the west side of Houston.[55] Mr. Vogt noted that Mr. Ellman's settlement predictions are flawed because they fail to account for the lower-lying sand formation, which arrests settlement.[56] The trial judge was therefore free to believe Mr. Vogt's opinion or assume that the truth lies somewhere in the middle. *See 8100 N. Freeway, Ltd.*, 363 S.W.3d at 854 (no abuse of discretion in basing decision on disputed testimony). It is also significant that Mr. Ellman's projected parade of foundation horribles is *completely solved* by extending the foundation piles past the clay formations and into the sand lying 110 feet below the surface.

In summary, the trial judge did not clearly abused his discretion in finding that any future harm, were it to occur, could be adequately remedied by damages.

F. The Balance of the Equities Favors the Defendant.

1. General Principles.

Balancing of the equities is a function for the trial judge in his role as chancellor, not for the jury. *See Georg v. Animal Defense League*, 231 S.W.2d 807, 811 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.). In *Storey v. Central Hide & Rendering Co.*, 148 Tex. 509, 226 S.W.2d 615, 618-19 (1950), the Supreme Court stated that the trial judge, as chancellor, must weigh and compare three contingencies:

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[55] 10 RR 26-31, 55-71, 175-76; 15 RR 7-40.

[56] 10 RR 55-56. Mr. Ellman admitted that "[f]or compressibility purposes, it's the clays that can compress." 6 RR 48. The sand layer at this site was confirmed by the November 2013 boring. 17 RR 113, 122-23; DX 142.

(a) Plaintiffs' harm if injunctive relief is denied and they are relegated to the recovery of monetary damages;

(b) Defendant's harm if injunctive relief is granted; and

(c) the public's harm if injunctive relief is granted and the public is thereby deprived of the benefits of the project.

2. Harm to the Plaintiffs Is Slight at Most.

As 1717 has argued here and elsewhere, the liability findings are unsupported by legally sufficient evidence or pleadings.[57] Thus, it goes without saying that Plaintiffs' harm weighs zero.

The following argument on balancing the equities assumes *arguendo*, as it must, that the liability findings can be upheld on some theory of fact. Even so, this Court is not bound by the verdict to accept the Plaintiffs' worst case scenario, as if the verdict were an affirmative finding on each and every theory of harm. Claimed harms which have no support in the pleadings, or the evidence, add no weight to the scales. The same is true for non-actionable annoyances (like shadow), or traffic congestion on public streets, which only the public has standing to raise. *Cf. Ladd v. Silver Star I Power Partners, LLC*, No. 11-11-00188-CV, 2013 Tex. App. LEXIS 6065, at *6, 2013 WL 3377290 (Tex. App.—Eastland May 16, 2013, pet. denied) (mem. op.) ("if the bundle is to contain those things that go to make up a nuisance, then those things that cannot support a nuisance claim, as a matter of law, should be removed from the bundle.").

[57] *See* Appt's Br., at pp. 29-50; *see also supra*, at pp. 21-22.

In weighing the Plaintiffs' harm, the district court, while upholding the verdict against 1717's no-evidence challenges, did properly discount certain of the Plaintiffs' claims through a comparative analysis of the liability findings. As the court noted, the limited geographic distribution of the liability findings strongly suggests that Plaintiffs' traffic and shadow concerns are at most *de minimis*.[58] The court also properly disregarded the Plaintiffs' privacy concerns, given that most every two-story structure in the inner city potentially offers a vantage point for a peeping tom to glance into a neighboring yard.[59] On appeal, the Plaintiffs have not complained of these rulings.

Historical context is also a proper factor for evaluating a plaintiff's claimed harm.[60] As the district court correctly observed, "Plaintiffs' opposition is primarily scale" – a large residential building to be surrounded by smaller residential buildings.[61] This is part of an obvious trend in Houston – as the population has increased, buildings grow skyward. The district court so noted: "This neighborhood is becoming dense even without this Project."[62] If built, the 21-story apartment building will fit comfortably within future urban landscape as one of many other large structures in or near the Medical Center.

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[58] CR 1207.

[59] CR 1213-14.

[60] *See Del Luensmann v. Zimmer-Zampese & Assocs.*, 103 S.W.3d 594, 600 (Tex. App.—San Antonio 2003, no pet.) (holding that the trial court did not abuse its discretion in refusing to enjoin the operation of a racetrack producing 85 decibels of sound, because "the evidence at trial clearly permitted the judge to conclude that the noise from other sources — the highway, the train tracks, the shooting range, and the air traffic — exceeded 85 decibels even before the race track began operations").

[61] CR 1209.

[62] *Id*.

What seems to be the main premise of the Plaintiffs' appeal is the argument that a homeowner's right of enjoyment *always* trumps an adjoining owner's right to devote its property to the highest and best use. Texas law rejects this *per se* approach. In *Storey*, the Supreme Court recognized that the balance of equities can even favor the continued operation of a hide rendering plant against valid claims by homeowners that the stench and insects produced by the rendering operation constituted a nuisance – an annoyance for homeowners of an entirely different order of magnitude than a high rise building. *Storey*, 226 S.W.2d at 618. Numerous other Texas cases are in accord.[63]

Plaintiffs have cited only one case in which a trial judge's order *denying* an injunction was reversed and an injunction rendered for the plaintiff – *Spiller v. Lyons*, 737 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1989, writ denied). *Spiller* is not on point. It involved a claim by homeowners to enforce residential-only deed restrictions against a commercial development, a motor hotel. In a deed restriction case, a plaintiff does not need to prove irreparable injury or the absence of an adequate legal remedy, only a material violation of the deed restriction. *See Jim Rutherford Invs.*, 25 S.W.3d at 849. The contractual right at issue in *Spiller* – to exclude non-residential uses – is distinctly different than the tort right at issue here, which protects one's reasonable use and enjoyment but cannot be enforced simply to preserve the single-family

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[63] *See Hill v. Villarreal*, 383 S.W.2d 463, 465-67 (Tex. Civ. App.–San Antonio 1964, writ ref'd n.r.e.) (despite jury finding that rendering plant constituted a nuisance for nearby homeowners, trial court did not abuse its discretion in weighing the equities in favor of plant and denying the injunction); *Gose v. Coryell*, 126 S.W. 1164, 1170 (Tex. Civ. App. 1910, no writ) ("While the right of habitation is one of great importance, and while the law should and does afford all reasonable protection to the home, still, these high considerations do not, in all instances, override all others."); *Schiller v. Raley*, 405 S.W.2d 446, 447 (Tex. Civ. App.—Waco 1966, no writ) (balancing harms in favor of defendant's feed lot despite jury finding that the feed lot was a nuisance for plaintiff's enjoyment of home).

character of a neighborhood. In *Spiller*, moreover, there is no discussion of balancing of equities, so presumably that issue was not raised.[64]

The facts of *Spiller* are also distinguishable. The *Spiller* court stated that "the present water and sewer services are already strained and that the operation of a hotel would further impair those services." *Spiller*, 737 S.W.2d at 30. In the present case, by contrast, the evidence proved that 1717 had spent $450,000 upgrading the capacity of the sewer lines serving the neighborhood,[65] and no evidence exists to prove that the utility demands of the Project would leave the surrounding residents with inadequate capacity. In addition, the injunction in *Spiller* was granted in part because the motel would spur "the influx of strangers and transients," which would cause "an offense to normal sensibilities." 737 S.W.2d at 30. No claim has been made that the residents of the proposed high rise would offend anyone.

In summary, the trial court implicitly found that the alleged impacts from the Project would create no substantial risk to the health or safety of persons of ordinary sensibilities. Plaintiffs have cited no conclusive evidence to compel a contrary finding. The verdict, if upheld, is consistent with a finding by the jury of a slight future harm at most.

3. Harm to 1717 Is Significant.

The trial judge's express finding that "[e]njoining the Project will cause considerable hardship to the defendant,"[66] should be upheld. When balancing the equities, the court may

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[64] In a deed restriction case, moreover, the balancing test strongly favors enforcement by injunction. *See Cowling v. Colligan*, 158 Tex. 458, 312 S.W.2d 943, 946 (Tex. 1958), and its progeny.

[65] 10 RR 230-33, DX 10.

[66] CR 1210.

properly consider sunk investment costs.[67] 1717 "spent millions of dollars planning and designing the project."[68] Although the property could be resold, the millions spent on planning and design could not be recouped if another site were to be chosen.

When balancing the equities, the court may also consider the defendant's loss of anticipated profits.[69] The proposed injunction in this case would deprive 1717 of approximately $72 million in net profits.[70]

Also relevant is the fact that a significant portion of 1717's investment costs were incurred before the Plaintiffs filed suit on May 1, 2013.[71] In February 2012, 1717 settled its lawsuit against the City and obtained the permits necessary to proceed with construction. To achieve the settlement, 1717 agreed to concessions that cushioned the impact of the Project on the surrounding neighborhood.[72] In April 2013, in preparation for construction, 1717 vacated Maryland Manor of its tenants and gave up a rental income stream of $19,500 per month.[73] This

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[67] *See, e.g., Garland Grain Co. v. D-C Home Owners Improv. Asso.*, 393 S.W.2d 635 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.) (considering that defendant "would, no doubt, suffer a substantial financial loss [of land purchase price and start up operating costs] if forced to move or discontinue the business"); *Hill v. Villarreal*, 383 S.W.2d 463 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.) (total construction and equipment costs in constructing rendering plant considered).

[68] CR 1209; *see also* 17 RR 56-59, 64, 102-04, 132-33; DX 160-64.

[69] *Jewett v. Deerhorn Enterprises, Inc.*, 281 Ore. 469, 575 P.2d 164, 169 (Or. 1978) (projected profits from stockyard).

[70] 17 RR 61-63.

[71] CR 1.

[72] DX 9; 11 RR 43-44.

[73] 11 RR 59-64; DX 163-64.

entire investment of time and money would be irretrievably wasted if the "Project" could not be constructed in accordance with the plans approved by the City.

In their brief, Plaintiffs conclude that Mr. Kirton's calculation of sunk costs ($14.7 million) is somehow "incompetent," but offer no explanation how or why. As the CEO of 1717's managing partner,[74] Mr. Kirton was competent to calculate 1717's expenditures from its balance sheets and confirm the amount of those expenditures. *See ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 876 (Tex. 2010). Therefore, the district court properly credited Mr. Kirton's calculations.

Plaintiffs further argue that "it is just as likely that the Developer could come out ahead, not behind, if it built the Ashby High Rise at a more appropriate location." Cr.-Appts' Br., at p. 32. However, they have cited no evidence rebutting Mr. Kirton's testimony that the planned location for the Project will serve the unique market for high-end residential space in that area, and the profitability of the Project cannot be replicated elsewhere.[75]

4. Enjoining the Project Will Harm the Public.

If an injunction were granted in this case, the public will suffer significant harm. The record contains ample evidence to support the trial court's finding that the Project will benefit the City as a whole – "the Project will generate millions in tax revenues and provide housing for the medical center, Rice, and other urban destinations. . . . [I]t will contribute toward

[74] 17 RR 55-64, 103-05; DX 160-61.

[75] 17 RR 67-68, 107-08.

reduction in urban sprawl and congestion on freeways feeding the city center."[76] This finding should be upheld.

The Supreme Court has stated that:

> [i]n modern society, . . . industries and nuisances often come in much larger packages, with effects on the public, the economy, and the environment far beyond the neighborhood. A court sitting in equity today must consider those effects by balancing the equities before issuing any injunction.

Schneider Nat'l Carriers, Inc., 147 S.W.3d at 287 (quoted by Judge Wilson's memorandum opinion, at CR 1210). In nuisance cases, the public interest is weighed according to the public need for the condition or activity targeted by the proposed injunction,[77] the potential economic boost for the community,[78] and the potential loss of tax revenues to the community.[79]

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[76] CR 1212; *see also*, supporting evidence at 10 RR 200 (232 quality residences), 17 RR 71 (2000 to 2800 jobs), 17 RR 66 ($1.7 million annual property tax).

[77] *See, e.g., Hill*, 383 S.W.2d at 465-66 (rendering plant – "helps to conserve what would otherwise be wasted and helps to afford an efficient and economical means of disposing of dead animals, scraps and offal"); *Hall v. Muckleroy*, 411 S.W.2d 390 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.) (livestock auction barn – a business that enabled farmers, ranchers and livestock owners in several counties to market annually livestock of a value in excess of $3 million, an amount "greatly in excess of any damage plaintiff has suffered.").

[78] *See, e.g., Lee v. Bowles*, 397 S.W.2d 923, 926 (Tex. Civ. App.—San Antonio 1965, no writ) (considering evidence that auto race track "would help the economy of the area and stimulate tourist trade"); *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) (denying injunction to "further the public's interest in aiding the struggling local economy and preventing job loss"); *Earth Island Inst. v. Carlton*, 2009 U.S. Dist. LEXIS 74066, at *92, 2009 WL 9084754 (E.D. Cal. Aug. 20, 2009) (denying injunction because otherwise "the public will lose the benefit of a boost to the local economy as a result of the creation of jobs by the Project").

[79] *See* RESTATEMENT (2d) OF TORTS, § 942, comment c ("The local community sometimes has a public interest at stake. For example, it will suffer loss of taxes and purchasing power of workers if an industrial plant that has been found to be a nuisance is ordered to be shut down or moved to another location. Here the community interest appears to carry weight on the side of the defendant.").

The trial judge correctly noted that 1717 has "followed all of the rules required by the City."[80] The City of Houston agrees, notwithstanding Mayor Parker's personal opposition, and even filed an amicus letter in *support* of the Project:

> "[W]e are concerned that the prospect of affording injunctive relief against a fully permitted development that satisfies all laws, regulations and deed restrictions, and the like will **irreparably impair development in this City**. The uncertainty surrounding the outcome of such lawsuits would hinder developers from financing, leasing, and constructing new real estate developments in Houston, which require long-term, secure contracts.[81]

On appeal, Plaintiffs do not challenge the enormous public benefits the Project will bring. Plaintiffs challenge only the sufficiency of the trial court's determination that enjoining this Project will chill development in the City. This determination is amply supported by legally sufficient evidence.

The controversy over the so-called "Ashby High Rise" has been prominent in the local news for several years. The notoriety of this case has prompted a local developer association, the Houstonians for Responsible Growth (HRG), to file an amicus brief in opposition to the suit, "[f]or fear that this lawsuit could irreparably impair future development in this City." [82] This suit, predicts HRG, could encourage other similar nuisance actions against lawful developments throughout the City. Echoing this position is Hunt Development Group, a part owner of 1717. Hunt's investment manager, Mr. Gary Sapp, characterized the injunction sought by Plaintiffs

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[80] CR 1212.

[81] CR 1180 (emphasis added).

[82] CR 447-61.

as "*de facto* zoning without a rule book," adding "more risk to the development and lending equation."[83] Rather that run the litigation gauntlet and hazard a jury's verdict on whether a proposed innovative project will blend in with its surroundings, developers will build elsewhere. The deterrent effect of an unpredictable legal environment will chill innovation and investment.

In their brief, Plaintiffs also contend, wrongly, that "the Developer misled the City to obtain permits for the project."[84] The trial court properly disregarded this argument. It is a red herring – there are no pleadings or findings of fraud; Plaintiffs lack standing to enforce the City's contract; and even if standing were no obstacle, there remains the fundamental disconnect between Plaintiffs' contention that 1717 will not honor the settlement and their requested injunction to prohibit the construction as permitted by the settlement. In any event, because Mr. Morgan has denied any intent to breach the settlement,[85] the trial court could not have abused its discretion in taking him at his word. *See 8100 N. Freeway, Ltd.*, 363 S.W.3d at 854.

Finally, Plaintiffs appear to place great weight on the new City buffering ordinance. This argument, too, is a red herring. The buffering ordinance does not operate retroactively, and it does not prohibit a high rise apartment in this location.

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[83] 17 RR 131-43, 148-49.

[84] Cr-Appts' Br., at 35, *see also id.*, at pp. 14-19.

[85] See record references at fn. 3 *supra*.

G. Other Equitable Principles Favor Denying the Injunction Sought.

1. The Proposed Injunction Is Overly Broad.

Courts must not only balance the equities. They must also narrowly and precisely draw any injunction they grant. *Schneider Nat'l Carriers, Inc*., 147 S.W.3d at 287; *Holubec*, 111 S.W.3d at 40; TEX. R. CIV. P. 683. Where the acts of the parties are divisible regarding lawful and unlawful conduct, an injunction may not be framed so broadly as to prohibit the enjoyment of lawful rights. *Kulkana v. Braeburn Valley W. Civic Ass'n*, 880 S.W.2d 277, 278 (Tex. App.--Houston [14th Dist.] 1994, no writ).

In the trial court, Plaintiffs requested an overly broad injunction, which is one reason why the trial court denied it. Their request on appeal to enjoin the "Ashby High Rise" is even broader.

As discussed above, the district court properly discounted Plaintiffs' privacy, traffic, and shadow concerns. Without those three concerns factored into the mix, there is no principled basis on which the 21-story height of the Project can be enjoined. The other claimed impacts, lights, noise, and foundation settlement, have nothing to do with height. Even traffic is only tangentially related to height, since traffic is a function of density (number of vehicles). As the district court correctly concluded, "a mid-rise would solve the height concerns of the neighborhood, but might have worse privacy and traffic concerns."[86]

Accordingly, when faced with the choice in this case between an injunction that prohibited the entire Project regardless of impact or no injunction at all, the court correctly

[86] CR 1208.

denied the requested injunction. That decision should thus be affirmed. As for the even broader injunction now sought on appeal, that request should be denied on the additional ground that it was not requested in the trial court. *See Fletcher v. King*, 75 S.W.2d 980, 982 (Tex. Civ. App.—Amarillo 1934, writ ref'd) (a court is without jurisdiction to grant relief beyond, or in addition to, relief specified in the petition) (and cases cited).

2. The Requested Injunction Would Require Unreasonable Judicial Oversight.

"Judges may hesitate to issue discretionary orders that require extensive oversight." *Schneider Nat'l Carriers*, 147 S.W.3d at 287 (quoted by Judge Wilson, at CR 1209). "Difficulties in drafting or enforcing an injunction may discourage the trial judge from considering the imposition of an equitable remedy." *Id*. at 189 (also quoted at CR 1289).[87]

Relying on these principles, Judge Wilson denied the requested injunction because "an order enjoining the construction of the Project as permitted would not end the controversy."[88] Rather, such order, he wrote, would trigger "a potentially endless series of lawsuits or contempt motions testing whether various tweaks and revisions of the Project would be a nuisance or a violation of the injunction."[89] Judge Wilson properly refused to become, as he put it, "a one man zoning board with little criteria."[90]

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[87] *See also* RESTATEMENT (2d) OF TORTS § 943 (ALI 1979) ("the practicability of drafting and enforcing an order or judgment for an injunction is one of the factors to be considered in determining the appropriateness of injunction against tort.").

[88] CR 1208.

[89] *Id*.

[90] CR 1211. *See also* M. Lewyn, *Is an Apartment a Nuisance?*, 43 REAL ESTATE L.J. 509, 519 (Spring 2015) (analyzing the present Ashby High Rise case and concluding that "disputes over when multifamily housing is compatible with other land uses should be raised in zoning proceedings, not in nuisance actions,

On appeal, the Plaintiffs do not contend that the injunction they seek would be any easier to administer than the scenario Judge Wilson forecast. Rather, they contend that the trial court effectively placed the burden on them to obtain findings that *alternative* designs of the Project would be a nuisance. Not so. Judge Wilson gave the Plaintiffs the broad-form charge they wanted. The general verdict they received, however, does not support the overly broad injunction they requested.

In their brief, the Plaintiffs contend that two Texas cases invert the burden of proof to require *the defendant* to negate that any alternative use of the land will be a nuisance: *Pool v. River Bend Ranch, L.L.C.*, 346 S.W.3d 853 (Tex. App.—Tyler 2011, pet. denied), and *Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212 (Tex. App.—Houston [14th Dist.] 1989, writ denied). Neither case places the burden of proof or persuasion on any issue upon the defendant.

Pool was a case in which the plaintiff sought a very broad injunction — to prohibit the use of the defendants' property as a commercial all-terrain vehicle (ATV) park. This would be the equivalent of the Plaintiffs in our case seeking an injunction against all types of high rise structures on 1717's tract, for example, anything over 6 stories. In *Pool*, the case was tried to the bench, and the court made a very broad finding of fact, including a finding that "**[a]ll** of the all terrain vehicle events and motocross events that occurred on the Defendants' property substantially interfered with the Plaintiff's and Intervenors' use and enjoyment of the property

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because zoning authorities can weigh homeowners' interest in avoiding congestion and similar externalities against the citywide public interests") (**Appendix 6**).

they own." 346 S.W.3d at 858-59 (quoting FF No. 23) (emphasis added). *Pool*, unlike the present case, also involved a single-impact claim – noise pollution. The injunction granted on the basis of this finding was equally broad — a ban on all commercial ATV use. *Id*. at 855. (Private ATV use was not prohibited).

On appeal in *Pool*, the defendant argued that the ban on all commercial ATV use was too broad. The appeals court rejected this argument, pointing out that if the defendant wanted to make that argument the defendant should have put evidence in the record to show that some types of commercial ATV uses would not create a nuisance, and they failed to do so. *Id.*, at 860. *Pool* does not shift the burden of proof or persuasion. It simply refers to a shift in the burden of production when the plaintiff has satisfied his burden of proof to support the broad injunction requested.

In the present case, the Plaintiffs have not alleged or secured findings that all high-rises are a nuisance in that location — they have only attacked this one particular proposal, which consists of many design elements each alleged to cause a separate nuisance impact. Unlike the plaintiff in *Pool* who sought and obtained a finding that "all" types of commercial ATV activities constitute a nuisance, the Plaintiffs in this case did not request, or obtain findings that all of the design elements of the Project would cause each and every one of the impacts alleged.

In *Freedman*, as the Plaintiffs acknowledge, the defendant simply offered proof at trial that its parking lot could include design features to mitigate the problem at issue. There is nothing in that opinion suggesting that the defendant must lay out all potential proposals for jury

review, or forfeit the right to devote the property to an alternative use that has not been challenged.

The Plaintiffs have also cited *Champion Forest Baptist Church v. Rowe*, No. 01-86-654-CV, 1987 Tex. App. LEXIS 6168, 1987 WL 5188 (Tex. App.—Houston [1st Dist.] Jan. 8, 1987, no writ) (do not publish), which the trial court disregarded as a pre-January 1, 2003, unpublished opinion, with no precedential value (*see* TEX. R. APP. P. 47.7). Its writ history is nil – it has never been cited in nearly thirty years.

In any event, the facts and procedural history of *Champion Forest* are distinguishable, as reflected by the unpublished district court judgment from that case which the Plaintiffs have cited in their brief.[91] In that judgment, the trial judge recited several precise supplemental findings of fact that each of the impacts in question would in fact create a nuisance for the plaintiffs. The trial judge relied on express findings to support his omnibus injunction. In the present case, by contrast, Judge Wilson made no subsidiary findings; nor did the jury. Therefore, the trial court in his case had no rational basis *in fact* to ban high rise structures indiscriminately from this location.

Rather than serve as a model for how courts ought to adjust competing property rights, the *subsequent case history* of *Champion Forest* far better illustrates the administrative quagmire a court can create for itself when it invokes its broad nuisance abatement powers for the purpose of supervising a major construction project. *See Rowe v. Moore*, 756 S.W.2d 117 (Tex. App.— Houston [1st Dist.] 1988, orig. proceeding) (mandamus to compel trial court to

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[91] CR 1058-61.

enforce permanent injunction denied). For reasons ably articulated in his memorandum opinion, Judge Wilson properly declined to become the one-man zoning board for this high rise project.

3. "Lesser" Factors Also Support Denial of the Injunction.

Judge Wilson identified a "couple of other factors" that influenced his ruling, although these were "of lesser importance."[92] How much "lesser" is unstated. For purposes of this appeal, however, these factors are immaterial, because even if the Court of Appeals were to disregard them entirely, the Plaintiffs are not entitled to the injunction they have requested from this Court.

First, it is undisputed, as the trial court found, that several of the Plaintiffs moved into the neighborhood in the midst of, and despite, the yard sign campaign.[93] This fact tends to prove that the prospective harms complained of by the Plaintiffs are insufficient to deter persons of reasonable sensibilities from choosing to live in the neighborhood. On appeal, the Plaintiffs have not challenged the court's consideration of this fact.

Second, Judge Wilson found inappropriate the threats made by many of the neighbors against 1717's principals, Mr. Morgan and Mr. Kirton, and their families.[94] The court acknowledged that "most of the plaintiffs' conduct has been perfectly proper."[95] However, several of the Plaintiffs admitted to signing some of the threatening petitions,[96] and the evidence

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[92] CR 1214.

[93] CR 1215.

[94] *Id.*

[95] *Id.*

[96] *See, e.g.* DX 26-40, 61, 93; 3 RR 122-24.

plainly showed that the hostile, objectionable activities were carried out by organized groups of which many of the Plaintiffs were members.[97] Judge Wilson did not rule that the unclean hands of some tainted the hands of the rest, but he did believe – correctly – that the lawsuit was the joint effort of a much larger group of "anonymous" supporters who had stepped over the bounds of decency and fair play.

In the end, the issue of unclean hands is a red herring too, because it is the claimed invasion of property rights that dictates the outcome, not whose hands are soiled; and for reasons now stated, the Plaintiffs are not entitled to the appellate injunction they seek.

H. The Plaintiffs' Election of Damages Bars Injunctive Relief.

The Plaintiffs have not offered to remit their damage award in the event they secure an injunction on appeal. Clearly they cannot have both. As the district court noted, damages and injunctive relief are mutually exclusive.[98] By standing on their damage award, Plaintiffs are estopped by the final judgment to seek an injunction. *See Seamans Oil Co. v. Guy*, 114 Tex. 42, 262 S.W. 473, 474 (1924) ("if one having a right to pursue one of several inconsistent remedies makes his election, institutes suit, and prosecutes it to final judgment . . . such election constitutes an estoppel thereafter to pursue another and inconsistent remedy") (internal quotations omitted). Alternatively, Plaintiffs should be made to remit damages as a condition of any injunction granted. *See S. County Mut. Ins. Co. v. First Bank & Trust*, 750 S.W.2d 170, 173-74 (Tex. 1988).

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[97] *See, e.g.*, 4 RR 95, 170, 257-58; 5 RR 54-55; 8 RR 86-87.

[98] CR 1205 (citing *Schneider Nat'l Carriers*, 147 S.W.3d at 284).

VI. PRAYER.

For the foregoing reasons, Cross-Appellee 1717 requests the Court of Appeals to affirm the denial of permanent injunctive relief. Alternatively, if the Court grants the injunction requested, 1717 requests the Court to vacate the damage awards. In any event, 1717 requests an award of costs on appeal and any other and further relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that all counsel of record have been served a copy of the foregoing Appellant's Brief by electronic submission for filing and service on July 1, 2015, through an approved EFSP of the Texas Online EFiling for Courts.

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CERTIFICATE OF COMPLIANCE

Pursuant T.R.A.P. 9.4 (i)(3), the undersigned certifies that this Brief complies with the type-volume limitations of T.R.A.P. 9.4 (i)(2)(D).

1. Exclusive of the exempted portions of T.R.A.P. 9.4(i)(1), this Brief contains 12,178 words as indicated by the word count function of the below referenced software.

2. This Brief has been prepared in proportionally space typeface using:

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/s/ *Ramon G. Viada III*
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BACK TO BRIEF

CAUSE NO. 2013-26155

PENELOPE LOUGHHEAD, ET. AL	§	**IN THE DISTRICT COURT OF**
	§	
v.	§	**HARRIS COUNTY, TEXAS**
	§	
1717 BISSONNET, LLC	§	**157th JUDICIAL DISTRICT**

DEFENDANT'S TRIAL BRIEF ON BALANCING THE EQUITIES

Defendant 1717 Bissonnet, LLC submits this trial brief on the Court's balancing of equities of Plaintiffs' claim for permanent injunctive relief.

I. OVERVIEW AND SUMMARY OF ARGUMENT.

In addressing the respective roles of judge and jury in a nuisance case, the Supreme Court has explained that "a litigant has the right to a trial by jury in an equitable action," the jury makes findings on "ultimate issues of fact" that are "binding," and the trial court— "exercising chancery powers"—then determines "whether to grant an injunction based upon the ultimate issues of fact found by the jury." *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979).

Injunctive relief in this case cannot be granted unless the Court determines that the following five conditions are present:

(1) a nuisance is reasonably certain to occur if not enjoined;

(2) the harm from the nuisance is imminent;

(3) the harm is irreparable (i.e., cannot be remedied by damages);

(4) a remedy at law (damages) is inadequate; and

(5) the balance of equities tip in favor of the Plaintiffs.

This Court's weighing of the equities will be hampered by the lack of jury findings that identify which of the specific design features of the Project will create a nuisance if the Project is built. Nevertheless, it is possible to draw reasoned inferences from the jury findings, and from the evidence, and conclude the following as to the prospective harms:

(1) A comparison of the liability and non-liability findings (Question 1) reveals that close proximity is a determining factor in the jury's liability findings. However, the fact that the jury refused to find that a nuisance would be created for properties on the north side of Bissonnet strongly suggests that traffic congestion, shadow effect, and loss of privacy were not the harms the jury had in mind when answering Question 1 in favor of the 20 prevailing Plaintiff properties.

(2) A comparison of the loss of market value findings (Question 2) could support a conclusion that the jury believed that the foundation of the Project would compress the soils underlying the abutting properties and damage the foundations of those properties. Generally, abutting homes located in the area of allegedly "moderate" foundation damage (as predicted by Plaintiffs' geotechnical expert, Ellman) received awards of 12% loss of market value. Homes located in the area of allegedly "severe" foundation damage (per Ellman) received 15% loss-of-market-value awards.

(3) Harms outside of the zone of anticipated foundation damage were even more modest (3%-5%). One can only speculate what the jury had in mind. Perhaps the jury was concerned about light from the parking garage; perhaps it was the aesthetics of the garage; perhaps it was the inevitable noise and other potential annoyances from the construction of the building. All of these feared harms were unpled and should thus be disregarded.

(4) There is no evidence, much less evidence that proves with reasonable certainty, that any of the prospective harms alleged or tried – even if they do eventually occur – will pose any safety risk to any of the Plaintiffs.

(5) There is no evidence, much less evidence that proves with reasonable certainty, that any of the feared harms from the Project, if actualized, are of such a nature as to render the Plaintiffs' homes unfit for living.

(6) The jury verdict on lost market value proves that the prospective damage is compensable ($1.22 million) and that the homes will retain most of their value (average loss of 8% for the twenty prevailing properties).

(7) Plaintiffs' geotechnical expert, Mr. Ellman, testified that although some amount of foundation damage is reasonably certain, the severity of the damage that each property will experience cannot be accurately predicted, except within broad ranges.

(8) No evidence was adduced to prove that foundation damage, if and when it ever occurs, would be irreparable.

(9) No evidence was adduced to prove that the prospect of any of the foundation damage to the Plaintiffs' homes as forecast by Mr. Ellman cannot be avoided simply by modifying the design of the building foundation, such as by using deeper piles in specific locations to ensure the equivocally that no soils consolidation or settlement will occur.

(10) Although there was anecdotal evidence of noise to be expected during the construction phase of the Project, no evidence exists to show that the level of noise and any other construction-related annoyances would be any worse than the annoyances typically encountered with other large construction projects in the inner city, which is regulated by municipal ordinance. Construction noise in the abstract is part and parcel of big city life.

(11) Although there was evidence adduced to prove that the Project garage would be lighted, there was no evidence to prove that the lighting visible to the surrounding neighborhood would be materially worse than lights that could be seen in Maryland Manor Apartments, or lights that can be expected with any other development characteristic of the mixed-use, inner city area in which the Plaintiffs choose to reside.

(12) There is no evidence that spill lighting from the garage cannot be further reduced simply by adding decorative screening to the garage openings and installing motion sensors on the already shielded light fixtures.

The harms to the Plaintiffs if the requested injunction were denied weigh less than the harms to the Defendant and the public if the injunction were granted. In the hearing, the Defendant will prove the following:

(1) The Defendant's investment costs in this Project are $14,733,945.11, of which all could be lost depending on the scope of the injunction.

(2) The Project has been designed to provide high-quality apartment housing that is desperately needed in the Texas Medical Center area. Fully leased, it will be home for 232 households, estimated to comprise between 300 to 350 Houstonians. When completed, the Project will attract many medical professionals (doctors, medical residents, and other key health professionals), as well as older retirees for whom proximity to the Medical Center could be of paramount concern. Proximity to the Texas Medical Center for those tenants could mean the difference between life and death.

(3) The development costs for the Project will approximate $100,000,000. The development of the Project will support an estimated 2,200 to 2,850 full-time equivalent jobs in the local economy, and the ongoing management and maintenance of the building will support hundreds more after it is built.

(4) The Project, when built, will add an estimated $66,400,000 in taxable value to the local ad valorem tax base during its first year of stabilized operations alone. At current tax rates, the completed Project will contribute an estimated $1,699,500 *during just this first year* to the operations of local taxing units. The Plaintiffs' prospective damage is $1,661,000 for *all time*, even counting the double recovery of lost use and enjoyment.

The jury findings of damages in this case, though not ripe, do demonstrate that the Plaintiffs' damages can be remedied with money damages if they are incurred. Beyond insurance coverage for foundation damage, the amount of prospective damages, were they to occur, are of a magnitude that this Defendant can pay.

Finally, it will be shown that the prospective harm of the Project as proposed at the time of trial is no longer imminent, and thus, an injunction to enjoin the Project as then designed is moot. The Defendant has changed the design in the following respects:

(1) **Enhanced Foundation Design.** The 71 auger-cast piles underneath the two main shear wall boxes at the southwest and southeast corners of the garage will be lengthened an average of twenty feet each, so that their tips extend at least two feet into the permanent sand layer existing approximately 110 feet below the surface. This enhancement of the foundation design of the building will eliminate the threat of settlement of the underlying soils and the risk of foundation damage to the surrounding properties, even if, *arguendo*, Mr. Ellman's assumptions are assumed true.

(2) **Garage Light Screening.** To further mitigate light from the garage beyond the requirements of the City of Houston Settlement Agreement, the Developer will add decorative screening to garage openings and install motion sensors to activate lights.

(3) **Privacy Screening.** The Developer will add continuous planters along the parapet wall of the sixth-floor amenity deck, to prevent occupants from having the ability to look straight down onto adjacent properties.

II. ESSENTIAL ELEMENTS FOR PERMANENT INJUNCTIONS.

Ordinarily, injunctive relief may only be granted upon a showing of:

(1) the existence of a wrongful act;

(2) the existence of imminent harm;

(3) the existence of irreparable injury; and

(4) the absence of an adequate remedy at law.

Jim Rutherford Invs., Inc. v. Terramar Beach Community Ass'n, 25 S.W.3d 845, 849 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also Bates v. Kingspark & Whitehall Civic Improvement Ass'n*, No.

01-11-00487-CV, 2012 Tex. App. LEXIS 3498, 2012 WL 1564309 (Tex. App.—Houston [1st Dist.] May 3, 2012, no pet.) (mem. op.) (restating *Jim Rutherford* elements).

This is not an ordinary injunction case because, currently, no "wrongful act" yet exists, so, strictly speaking, element (1) of the *Jim Rutherford* test does not apply. This is a claim to enjoin an *anticipatory* nuisance – a proposed building which, if built in the future, will (according to the jury) constitute a nuisance for twenty of the plaintiff properties.

In a nuisance in fact case, there is a fifth element – the Court must weigh the competing equities, including the public interest, and determine whether the equities weigh in favor of granting an injunction. *See, e.g., Storey v. Central Hide & Rendering Co.*, 148 Tex. 509, 226 S.W.2d 615, 618-19 (1950). This is not a suit to enjoin a nuisance per se – a use that is illegal in itself. It is a suit to enjoin a lawful, beneficial use – a multi-family residential building. As discussed below in Section III of this Brief, a court cannot enjoin a lawful use of property even if found to constitute a prospective nuisance unless the equities for doing so weigh in the plaintiff's favor. In cases where the balance of equities tip in the defendant's favor, as is the case here, the plaintiff must be relegated to a suit for monetary damages and not injunctive relief. *Id.*

Finally, "[i]n order to warrant a court of equity to grant injunctive relief, the applicant must specify the precise relief sought," and "a court is without jurisdiction to grant relief beyond and in addition to that particularly specified." *Fairfield v. Stonehenge Asso.*, 678 S.W.2d 608, 611 (Tex. App.—Houston [14th Dist.] 1984, no writ). "Permanent injunctions 'must be narrowly drawn and precise.'" *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 287 (Tex. 2004) (quoting *Holubec v. Brandenberger*, 111 S.W.3d 32, 40 (Tex. 2003)). An injunction cannot be drawn "so broad as to enjoin a defendant from activities which are a lawful and proper exercise of his rights." *Holubec*, 111 S.W.3d at 40; *see also Villalobos v. Holguin*, 146 Tex. 474, 208 S.W.2d 871, 875 (1948) (same); *Scoggins v. Cameron County Water Imp. Dist. No. 15*, 264 S.W.2d 169, 173 (Tex. Civ. App.—Austin 1954, writ ref'd). An injunctive decree "cannot prejudge

new situations, which were not before the court in the first instance, whether prejudging them as nonviolations or violations of its general terms." *See San Antonio Bar Asso. v. Guardian Abstract & Title Co.*, 156 Tex. 7, 291 S.W.2d 697, 702 (Tex. 1956).

The Plaintiffs tried this case on the theory that the High Rise Project, as proposed at the time of trial, would constitute a private nuisance if built – and their prayer for relief seeks to enjoin the proposed Project *en toto* – as it was proposed.[1] Neither the pleadings nor the jury findings in this case support the issuance of an injunction that would prohibit design alternatives that the jury has not considered, much less declared to be a prospective nuisance. That is to say, the Plaintiffs have not prayed for caps on the number of floors, for specified limits on density, for privacy screens, or for any aesthetic embellishments of the type commonly required by zoning regulations, which the voters of Houston have repeatedly rejected. The Plaintiffs have adduced no evidence to prove that any alternative design – be it a different foundation with deeper piers, or more garage screening, or a left turn lane on Bissonnet – would create any prospective nuisance. Accordingly, this Court may not contemplate enjoining building or design alternatives that were not tried and not found by a jury to be a nuisance if built.

III. BALANCING THE EQUITIES: GENERAL PRINCIPLES.

Balancing of the equities is a function for the trial judge in his role as chancellor, not for the jury. *See Georg v. Animal Defense League*, 231 S.W.2d 807, 811 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.), which states in pertinent part:

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[1] In Paragraph 53 of their Seventh Amended Petition, "Plaintiffs ask the court to permanently enjoin construction of the High Rise *in its currently proposed form* at the project site." In the prayer, Paragraph 61a, "Plaintiffs respectfully pray for . . . a permanent injunction prohibiting the construction of the High Rise *at least in its current form at the proposed site*." The Court will recall that on August 9, 2013, it overruled Defendant's special exception that the "[Plaintiffs'] request [for injunctive relief] as phrased is too vague and ambiguous to give Defendant fair notice of what relief Plaintiffs seek and the scope of any permanent injunction sought by Plaintiffs." *See* Def. 2d Sp. Exceptions, No. 7, at p.5. In their response, the Plaintiffs argued that the request meant no more or less than what was requested – "Plaintiffs quite simply seek an order prohibiting the construction of *this* High Rise on *this* site." Pl. Resp. to 2d Sp. Exceptions, at p. 7 (Plaintiffs' emphasis). Based on this argument and the Court's ruling in reliance on it, the Plaintiffs are estopped from effectively amending their petition to request other relief not pled for at the time of trial. Any such amendment at this late date would work extreme prejudice on the Developer.

> It is not within the jury's province to pass upon the issue of whether or not the private nuisance which would result from the [proposed use of the defendant's property] will be outweighed by the public welfare. This is not a fact issue, but one to be determined by the chancellor in accordance with established equitable rules and principles.

Id.

In *Storey v. Central Hide & Rendering Co.*, 148 Tex. 509, 226 S.W.2d 615, 618-19 (1950), the Supreme Court announced guidelines for weighing equities in nuisance cases. In short, to weigh the equities, the Court must weigh and compare three contingencies:

(1) the harm that the Plaintiffs will suffer if injunctive relief is denied and the Plaintiffs are relegated to the recovery of monetary damages;

(2) the harm that the Defendant will suffer if injunctive relief is granted; and

(3) the harm the public will suffer if injunctive relief is granted and the public is thereby deprived of the benefits of the project.

The discussion of the balancing principles in *Storey* provides for guidance this Court's comparing the relative harms in this case:

> According to the doctrine of 'comparative injury' or 'balancing of equities' the court will consider the injury which may result to the defendant and the public by granting the injunction as well as the injury to be sustained by the complainant if the writ be denied. If the court finds that the injury to the complainant is slight in comparison to the injury caused the defendant and the public by enjoining the nuisance, relief will ordinarily be refused. It has been pointed out that the cases in which a nuisance is permitted to exist under this doctrine are based on the stern rule of necessity rather than on the right of the author of the nuisance to work a hurt or injury to his neighbor. The necessity of others may compel the injured party to seek relief by way of an action at law for damages rather than by a suit in equity to abate the nuisance.
>
> Some one must suffer these inconveniences rather than that the public interest should suffer . . . These conflicting interests call for a solution of the question by the application of the broad principles of right and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact; this works hardships on the individual, but they are incident to civilization with its physical developments, demanding more and more the means of rapid transportation of persons and property.

> On the other hand, an injunction may issue where the injury to the opposing party and the public is slight or disproportionate to the injury suffered by the complainant.

Storey, 223 S.W.2d at 618 (ellipses in original, internal quotations deleted).

In an injunction action, a litigant has the right to a trial by jury on the "ultimate issues of fact." *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979). In weighing the equities, however, a trial court may consider evidence that was presented to the jury or to the judge outside of the presence of the jury. *See Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 287 (Tex. 2004). The conclusion that the balance of the equities favors an injunction lies within the trial court's sound discretion. *See Lee v. Bowles*, 397 S.W.2d 923, 926 (Tex. Civ. App.—San Antonio 1965, no writ).

In the following sections of this Brief, the Defendant will analyze each of the three harms which the Court must compare in its decision whether to grant injunctive relief. That is

(1) the alleged threat of harm to the twenty properties of the Plaintiffs who prevailed in the jury's verdict if the requested injunction is not granted (*see* Section IV, *infra*, pp. 8-25);

(2) the harm which the requested injunction would inflict on the Defendant, if granted (*see* Section V, *infra*, pp. 25-27); and

(3) the harm which the requested injunction would inflict on the public, if granted (*see* Section VI, *infra*, pp. 27-30).

IV. THREAT OF HARM TO THE PREVAILING TWENTY PLAINTIFF PROPERTIES.

A. Reasonable Certainty Standard for Weighing Threatened Harm to Plaintiffs.

Texas courts have long followed the maxim of equity jurisprudence that where a proposed structure, or the use of it, is not a nuisance *per se* – and in this case there is no contention, or proof, that the proposed high rise apartment building is a nuisance *per se* – a court of equity will not grant an injunction against the

erection of the structure or its use, merely because it may become a nuisance. Texas courts require proof that the threat is one that is *reasonably certain* to occur if the act or condition in question is not prospectively enjoined. As our Supreme Court has articulated the applicable certainty standard, "no injunction will be issued in advance of the structure unless it *be certain* the same will constitute a nuisance." *Waggoner v. Floral Heights Baptist Church*, 116 Tex. 187, 288 S.W. 129, 131 (Tex. 1926) (emphasis added); *see also Dunn v. City of Austin*, 77 Tex. 139, 11 S.W. 1125, 1127 (1889) (affirming dismissal of claim that proposed cemetery expansion would, upon completion, create a nuisance for plaintiff homeowners and stating: "The inquiry in this case is, does the petition allege the existence of such *facts as show with reasonable certainty* that a nuisance will be brought into existence, and that the petitioners and those whom they assume to represent will suffer injury thereby unless the relief prayed for is granted?") (emphasis added).

Texas courts of appeals have continued to apply and follow these long-established principles. *See, e.g., McAshan v. River Oaks Country Club*, 646 S.W.2d 516, 518 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) ("Before the construction and operation of the parking lot could properly be enjoined, as a nuisance, it was the McAshans' burden to show that River Oaks' use of the parking lot would create a nuisance per se or that its proposed use *would necessarily* create a nuisance. The evidence regarding the proposed use of the parking lot was not such as would compel a finding that such use would *necessarily* create a nuisance.") (internal citation omitted; emphasis added); *Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 216 (Tex. App.—Houston [14th Dist.] 1989, writ denied) ("When an attempt is made to enjoin an anticipated nuisance, *the threatened injury must not be merely probable but reasonably certain before a court will exercise its equitable power to restrain it*.") (emphasis added) (citing *O'Daniel v. Libal*, 196 S.W.2d 211, 213 (Tex. Civ. App.—Waco 1946, no writ)).[2]

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[2] *See also, e.g., Conner v. Smith*, 433 S.W.2d 911, 914 (Tex. Civ. App.—Corpus Christi 1968, no writ) ("The rule has been definitely established by our Texas courts that before the construction of a building and the operation of a business not a nuisance per se will be enjoined it must appear that the proposed use of the building will

B. Factors for Weighing Harm to Plaintiffs.

Texas appellate cases that have reviewed a trial court's weighing of equities have considered the following salient factors significant:

1. *Life in the Big City.* "People living in cities and large towns must submit to some inconvenience, to some annoyance, to some discomforts, to some injury and damage; must even yield a portion of their rights to the necessities of business, which, from the very nature of things, must often be carried on in populous localities and in compact communities, where facilities alone exist upon which it can be kept up and prosecuted.'" *Moore v. Coleman*, 185 S.W. 936, 938 (Tex. Civ. App. 1916, no writ) (quoting WOOD ON NUISANCES § 6 (1883 ed.)).[3]

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necessarily create a nuisance.") (emphasis original); *Dunaway v. City of Austin*, 290 S.W.2d 703, 705 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.) ("We believe that the trial court was correct in denying appellants any relief and justified in granting the Summary Judgment in favor of appellees, since there was no showing that the building is a nuisance per se or an *inevitable* nuisance however operated.") (emphasis added); *Jones v. Highland Memorial Park*, 242 S.W.2d 250, 252 (Tex. Civ. App.—San Antonio 1951, no writ) (affirming directed verdict for defendant on the ground that the plaintiffs failed to carry trial burden of showing "with definiteness and certainty that their wells will be contaminated if the proposed cemetery is opened and operated"); *Dickson v. Barr*, 235 S.W. 977, 978 (Tex. Civ. App. — Fort Worth 1921, no writ) (affirming dismissal of petition on theory that "the erection or alteration of a building for a lawful purpose will not be restrained where it is not shown that it will *necessarily* be a nuisance"); *Goose Creek Ice Co. v. Wood*, 223 S.W. 324 (Tex. Civ. App.—Galveston 1920, no writ) (reversing and rendering temporary injunction and following rule); *Iford v. Nickel*, 1 S.W.2d 751, 753 (Tex. Civ. App. 1928, no writ) ("The sacred right of the use and enjoyment of property cannot be taken or destroyed in a court of equity without pleadings so plain and clear as to be beyond criticism or dispute, followed by unimpeachable testimony. A court of equity will not extend allegation by construction, and this is peculiarly true in cases where the injury is only threatened, instead of an established nuisance."); *Deep E. Tex. Regional Mental Health Mental Retardation Servs. v. Kinnear*, 877 S.W.2d 550, 556 (Tex. App.—Beaumont 1994, no writ)("Great and in depth caution must be exercised when interfering with a structure to be built in the future which structure would have in the future a public purpose. It will not suffice to show a problem or contingent injury or nuisance. The record must show that the alleged results will be *inevitable and undoubted.*") (emphasis added); *Robinson v. Dale*, 62 Tex. Civ. App. 277, 131 S.W. 308, 310 (Tex. Civ. App. 1910, no writ) (reversing and denying injunction of a cotton mill for lack of sufficient evidence, and stating: "'Before a court of equity will restrain a lawful work from which merely threatened evils are apprehended, the court must be satisfied that the evils anticipated are imminent and *certain to occur.*'") (quoting Joyce, LAW OF NUISANCES, sec. 102).

[3] *See also Hamm v. Gunn*, 51 Tex. Civ. App. 424, 113 S. W. 304, 306 (1908) ("Inhabitants of the modern city are necessarily subjected to more or less of noise, of dust, and of other disagreeable things, and the only way in which they can be avoided is by seclusion from among the busy activities of the age, unless, indeed, we would destroy many progressive features and necessary enterprises of the time. If we live in a city, it is but reasonable that we abate somewhat of our own comfort and convenience for the common good."); *Von Hatzfeld v. Neece*, 223 S. W. 1034, 1034 (Tex. Civ. App. 1920, no writ) (quoting same passage).

2. *Nature and Severity of Injury to Use and Enjoyment of Home*: A nuisance that poses health or safety risks, or that drives the plaintiff from his home, imposes a weighty harm. *See Storey*, 226 S.W.2d at 618 ("the law does not allow one to be driven from his home or compelled to live in substantial danger or discomfort even though the danger or discomfort is caused by a lawful and useful business").[4] On the other hand, annoyances that do not drive the plaintiff from his home are less weighty. *Storey*, 226 S.W.2d at 617 (weighing equities in favor of defendant hide rendering plant where, despite obnoxious odors, "[t]he operation of the plant does not destroy any of the petitioners' homes"). Likewise, a nuisance that poses little or no safety risk is less weighty. *Garland Grain Co. v. D-C Home Owners Improv. Asso.*, 393 S.W.2d 635, 643 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.) (despite finding that nuisance-level odors from feed lot interfered with the plaintiffs' use and enjoyment of their homes, no injunction was warranted where, *inter alia*, "the question of health is not involved").

3. *Coming to the Nuisance*. The plaintiff's equities are less weighty if he acquired his property with knowledge that the defendant's use of its property may later rise to the level of a nuisance. *See, e.g., Galveston, H. & S. A. R. Co. v. De Groff*, 102 Tex. 433, 118 S.W. 134 (1909).

C. Analysis of Jury Findings to Determine Prospective Harms to Plaintiffs.

1. *Analysis of Liability Findings*. Over the Defendant's *Casteel* objection, the Court asked a single liability question as to each of the thirty plaintiff properties in question – essentially, will the Project constitute a nuisance for each such property if the Project is built? Embedded within this single, global liability question were several distinct theories of nuisance, none of which the jury addressed specifically in its global finding of nuisance:

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[4] *See also Hot Rod Hill Motor Park v. Triolo*, 276 S.W.3d 565 (Tex. App.—Waco 2008, no pet.) (plaintiff testified that frequent, sustained and extremely loud noises of defendant's race track would drive him from his home – he "cannot remain in his home if the track remains open.. . . He would have no reason to sell if the track is closed."); *Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217 (Tex. Civ. App.--Beaumont 1973, writ ref'd n.r.e.) (loss of 50% to 60% of market value due to noise pollution, coupled with fact that noise was so severe plaintiff would move out of his home rather than endure it).

(i) **traffic** – claims that high density that would increase future traffic and cause delays at the public intersection at Bissonnet and Dunlavy, which in turn would divert traffic through the area subdivisions, increase parking on side streets, and allegedly delay the deployment of emergency services;

(2) **privacy** – an alleged future invasion of privacy via views from the windows and other vantage points on the High Rise, into backyards and of the exterior of windows of the Plaintiffs' houses;

(3) **foundation damage** – a potential dish of subsidence around the foundation of the Project that would allegedly extend to, and damage, the foundations of fence-line Plaintiff properties;

(4) **shadow** – the shadow to be cast by the prospective building on Plaintiffs' lots would allegedly damage decorative plants and interfere with the Plaintiffs' enjoyment of the sunshine through their windows;

(5) **"abnormal and out of place"** – the sheer size of the proposed building would not fit with the surrounding neighborhood (in effect, an invalid complaint about aesthetics);

(6) **excessive light** – from the proposed parking garage;

(7) **construction-related annoyances** – irritations from the future construction of the Project (noise, vibrations, worker traffic, dust, etc); and

(8) **diminution of value** - alleged loss of current value due to the prospect of the proposed Project being built.

According to the jury's liability findings (Question 1), twenty plaintiff properties will experience a nuisance if the Project is built; the other ten plaintiff properties will not.

Defendant believes it is impossible, by deductive reasoning, to determine exactly which of the alleged impacts presented to the jury, or combination of impacts, were relied upon by at least ten jurors to support each "yes" answer to the liability question. All the Court can really know from the answers to Question 1 is that the jury – using a preponderance of the evidence standard – found that the Project, as it was proposed to be built as of the time of trial, would constitute a nuisance in some undefined way for twenty properties if it were built. Logically, each "yes" answer to Question 1 could have been based on only one of the claimed impacts, or on all of them, or perhaps on a subset of them, or perhaps on none at

all. The Court refused to instruct the jury to employ a reasonable certainty standard of proof, and thus, there is no finding that the Project, as then proposed, is reasonably certain to create a nuisance if built, only that a nuisance is more likely than not to occur if the Project is built.

The Court instructed the jury that it could find a prospective nuisance based upon a low standard of harm – any impact that will create more than a slight inconvenience or petty annoyance was defined in the Court's charge as a nuisance. *See* Charge of the Court, Q 1 (defining "substantial interference" as "more than a slight inconvenience or petty annoyance"). Therefore, in weighing the harm of denying injunctive relief, the Court simply cannot assume that the prospective harm will be significantly greater than "a slight inconvenience or petty annoyance."

For purposes of balancing the equities, therefore, and for purposes of deciding the proper scope of any injunction to be granted, the Court has only very broad liability findings to work with. In its role as equity chancellor, the Court cannot make supplementary liability findings. *See State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979) (in an injunction action, a litigant has the right to a trial by jury on the "ultimate issues of fact"). Nor may the Court prejudge new or alternative building or architectural designs not tried to the jury. *See San Antonio Bar Asso.,* 291 S.W.2d at 702.

Nevertheless, despite the absence of findings of specific nuisance impacts, it is possible for the Court, in light of the trial record, to compare the "yes" and "no" liability answers and make reasoned guesses about the jury's rationale for some of its findings.[5]

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[5] In suggesting this method for *interpreting* the rationale for the jury's answers, the Defendant does not give up or waive its *Casteel* objection to the broad form submission of Question 1, which has left this Court, as well as the appellate courts, with no actual fact finding of any specific impact, and thus, no way of determining whether the jury's affirmative answers are based upon legally invalid theories, upon theories unsupported by legally sufficient evidence, or upon the mere arbitrary whim of the jurors. Defendant believes that interpreting the jury's rationale for its answers by means of deductive comparison is no substitute for specific jury findings. The Defendant, therefore, objects to the Court enjoining any specific feature of this Project which has not been specifically found to constitute a nuisance. No specific feature was found to be a nuisance because no single feature was specified in the charge.

The obvious distinguishing feature between the "yes" and "no" liability answers is the proximity of the prevailing properties in comparison to the non-prevailing properties. All but one prevailing property either borders the Project or is across a narrow street, Wroxton Court or Southampton Estates.[6] Thus, whatever impact was found to constitute a prospective nuisance, that impact is of the type that will affect only the homes in close proximity to the Project.

A second distinguishing feature of the "yes" and "no" liability answers is the non-liability findings for property owners on the north side of Bissonnet. The garage can be seen from the west, south, and east, but not from the north, where the view is generally blocked by the high rise building. Accordingly, the jury may believe that the view of the garage will constitute a nuisance, although it is impossible to tell from the jury's answers whether it is the lighting from the garage, or the aesthetics of the garage, which the jury considered material.

A comparison of the liability and non-liability findings suggests that the mere size of the 21-story apartment building was not a determining factor. For if size were a determining factor, one would expect a liability finding for the four non-prevailing properties on the north side of Bissonnet. A tall building in the neighborhood would affect the sight lines from those properties just as it does the surrounding properties on the south, east and west. It follows, therefore, that the mere height of the apartment building is not a nuisance that needs to be enjoined.

Likewise, the shadow to be cast from the tower does not appear to be a determining factor in the jury's verdict, either. The properties on the north side of the Project will all be affected by shadow – the Olivers (Answer # 1(26)), Favre-Massartic (# 1(22)), Morian & Clark (1810 Bissonnet) (# 1(21)), Graves

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[6] The single anomaly is Earl Martin's property at 1811 Wroxton Road, which lies three lots to the west on Wroxton Road. One can only speculate about why the jury found that the Project would constitute a nuisance for him. Perhaps they felt he could see the garage from his front yard at night or they just felt sorry for him because he was a likable witness who sat in front of the bar the entire trial.

(# 1(19)), and Lee (# 1(25)) – and yet all lost the jury's verdict.[7] Thus, the jury findings do not support the issuance of an injunction to prevent a shadow from being cast across some of the other surrounding properties.[8]

For similar reasons, it appears that privacy concerns were not a material factor in the jury's reasoning. For if visual access from the building into backyards were a problem for homeowners on the east, south, and west sides of the proposed building, it is logical to assume that the jury would have found loss-of-privacy concerns sufficient for homeowner Plaintiffs on the northwest side, such as Laura Lee & Dico Hassid (Answer 1(25) (1731 South Blvd.)[9], and Adriana Oliver (Answer 1(26)) (5219 Woodhead).[10] However, the jury refused to find that the High Rise Project posed any anticipatory nuisance for these Plaintiffs. Thus, the jury findings do not support an injunction that prohibits the construction of a building that affords views into backyards or of the exterior of windows.[11]

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[7] *See* Grossman testimony relating to shadow effect on non-prevailing properties, at 11/21/13 Tr., at pp. 116, ln 11-15 (Morian/Clark lot) ("in the fall and the spring equinox, this particular residence will be in partial shadow for almost 45 percent of daylight hours. So in other words, 40 percent of the daylight hours, which is 12 hours in the case of the equinox, the lot will be in partial shade"); *see also* Plaintiffs' Shadow Study (PX 346).

[8] And in any event, the shadow effect is no basis for an injunction as a matter of law. *See* Defendant's Motion for Judgment and for JNOV, at pp. 11-17; *Klein v. Gehrung*, 25 Tex. 232 (Tex. 1860) (rejecting ancient lights doctrine); *see also Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc.*, 114 So. 2d 257 (Fla. App. 1959) (holding that asserted that nuisance law protects only those interests "which [are] recognized and protected by law," and that there is no legally recognized or protected right to access to sunlight.).

[9] Ms. Lee, who lost the jury verdict, testified that if the tower is built she would "lose the sense of privacy that I now have," not "feel as comfortable being in my backyard because of the looming presence of . . . this very, very large building right . . . right on the other side of my backyard. . . . It's even working in my home office. The window . . right beside my desk has a direct view of the site." 12/2/13 Tr., at p. 7, ln. 5-15.

[10] Ms. Oliver testified that if the building were constructed, "a lot of the floors would have a direct view of the swimming pool" – "the lack of privacy to enjoy your own backyard and having people overlooking in that, that would be very unpleasant and will make me uncomfortable. . . . And in my room, the master bedroom of the house, it looks south, so there would be again a direct vision from the building if it's built. So basically every time I have to change or just, you know, if I want to be in my own room, I would need to close the shutters in order to be able to have privacy to stay in my own room because I would lose the privacy there as well." 11/26/13 Tr., at p. 222-23.

[11] And in any event, there is no evidence, let alone evidence to prove with substantial certainty, that the Project, if built, will result in an invasion of any of the Plaintiffs' privacy. *See* Defendant's Motion for Judgment and for JNOV, at pp. 17-21.

The same comparison of liability and non-liability findings suggests that traffic probably played no role in the jury's determination. Otherwise, the jury would have found in favor of Plaintiffs such as Grave, Clark, Favre-Massartic, Oliver and Follis (Answer # 1(27)), whose properties would all be directly affected by the alleged increase of traffic congestion on Bissonnet. Accordingly, the Court has no jury findings on which to further limit the density of the proposed Project.[12]

In short, a comparative analysis of the liability and non-liability findings strongly suggests that the jury did not consider shadows, privacy, the number of floors, the mere size of the building, or increased traffic to be material in the jury's finding the Project to be an anticipatory nuisance for the twenty prevailing properties. The question remains whether, and to what extent, the other future impacts referred to at trial [13] – foundation damage, garage aesthetics, lighting, or construction annoyances – may have factored into those twenty liability findings.

2. *Analysis of Damage Awards.* The jury found that as to the twenty prevailing properties, the alleged prospective nuisance "caused" (past tense)[14] damages in the amount of $1,661,990.62. Within this

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[12] In addition, the Defendant will here reiterate its objection to the absence from the jury charge of any instruction on the essential elements of a claim for the proposed Project's anticipated impact on the traffic conditions, such as road congestion and increased traffic loads on community streets, on roads that are not owned by the Plaintiffs. In particular, the charge did not ask any predicate findings for standing to bring a public nuisance claim, such as whether each of the Plaintiffs has, or with reasonable certainty will suffer, harm of a kind materially different from that suffered by other members of the public exercising the right common to the general public that is the subject of feared interference. Because there is no finding of a public nuisance that any of the Plaintiffs has standing to bring suit to enjoin, the Court lacks jurisdiction to enjoin any aspect of the proposed Project for the purpose of reducing or redirecting traffic. 12/12/13 Tr., at p. 13.

[13] By acknowledging that these impacts were referred to at trial, Defendant does not intend to waive its complaint that some of these impacts were not pled. Plaintiffs failed to plead that the garage lighting or construction annoyances would constitute a nuisance; and therefore, for lack of pleading, the Court should deny any injunction that would affect these aspects of the proposed construction and design.

[14] In jury summation, the Plaintiffs' counsel argued that the damages awarded are not damages already sustained, despite the past tense of phrasing of Question 2, which asks "[w]hat sum of money, *if paid now in cash*," will compensate the plaintiffs for their damages "proximately *caused* by the nuisance?" (emphasis added). 12/16/13 Tr., at pp. 111-112. Clearly the jury was not asked what the damages "will be" (future tense) "if payable later", if, as, and when the building as designed is ever built. The (mis)interpretive gloss of Plaintiffs' counsel does not cure the defective charge on this issue and certainly does not create a ripe controversy over damages, since none of the damages are ripe.

total are separate findings for market value losses (total, $1,223,762.15) and loss use of use and enjoyment (total, $438,228.44).

Although a suit for damages in this case cannot be not ripe since no nuisance has yet occurred,[15] the jury awards can assist the Court in balancing the equities in two ways.

First, the loss of market value at the time of trial may be viewed as a rough proxy for the loss of market value when the building is completed.[16] Nevertheless, the findings of damages for loss of use and enjoyment cannot be considered as a harm for equities-balancing purposes, since those damages are subsumed within the findings of lost market value and therefore represent a double recovery.[17] Accordingly, for purposes of weighing the equities, the Court should consider only the lost market value awards ($1.223 million). On the average, the twenty prevailing properties have lost 8.2% of their market value. *See* 12/3/13 Tr., at p. 177 ln. 6-9; PX 263-292.

Second, by comparing the lost market values on a property-by-property basis, the jury's rationale for its liability findings can be better understood. Future foundation damage may have been the most

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[15] Damages cannot be recovered for threatened or anticipatory nuisances. *See, e.g., Sanders v. Miller*, 52 Tex. Civ. App. 372, 113 S.W. 996 (1908) (reversing lost market value damage award and rendering judgment for defendant where, as here, "the entire claim for damage is predicated upon a condition which it is expected will arise sometime in the future"); RESTATEMENT (2d) OF TORTS § 822 (private nuisance), comment d ("An injunction may be obtained in a proper case against a threatened private nuisance, *but an action cannot be maintained at law unless harm already has been suffered.*") (emphasis added).

[16] In the event this issue has to be retried in the future, the Defendant does not stipulate that the value assigned by the jury in this case will be relevant to the actual loss of market value, if any, at the time of retrial. Further, the Defendant does not concede that lost market value is the proper measure of damages for the types of nuisance effects with which the jury appeared concerned, as reflected by the instant analysis of its liability answers. Finally, Defendant does not abandon its contention that the damage model used by Mr. Spilker is incorrect, because it fails to isolate any of the alleged nuisance effects as the cause in fact of the lost market value. That is, Spilker's damage model that shows the loss of market value due to the prospect of the tower being built, which subsumes non-nuisance features of the project, such as the aesthetics of the high rise building.

[17] *See Vestal v. Gulf Oil Corp.*, 149 Tex. 487, 235 S.W.2d 440 (1951) (stating that market value damages for permanent injury to the real estate comprehends and includes loss of use and enjoyment of the land); *see also Kentucky-Ohio Gas Co. v. Bowling*, 264 Ky. 470, 95 S.W.2d 1, 1936 Ky. LEXIS 353 (Ky. 1936), stating: ("the diminution of its salable value necessarily includes the annoyance and discomfort which directly affects such value. It is not, therefore, proper to permit a recovery both for the diminution of the vendible or market value of the property and for the annoyance and discomfort which necessarily enter into and constitute a part of the diminution of such value. **To do so is to allow double recovery.**") (emphasis added).

significant factor in the jury's finding of a future nuisance. Properties in the area of "severe to very severe" foundation damage (as forecast by Mr. Ellman) received the highest lost market value awards – a 15% reduction.[18] With one exception, the areas projected by Mr. Ellman to experience "moderate" foundation damage were awarded lost market value awards representing a 12% reduction in value.[19]

For the prevailing plaintiff homes that are outside of the area of anticipated foundation damage, the damage awards dropped off sharply. Two of the prevailing plaintiff properties on the west side of the Project (1801 Bissonnet and 1804 Wroxton Road) received market value damages representing a 5% reduction in value.[20] All other prevailing plaintiffs received 3% awards.[21]

A comparison of the 5% and 3% awards reflects that spatial proximity was again the key factor. Although to second-guess the jury's rationale for the distinction involves some amount of speculation, it appears that the jury gave the 5% awards based upon the closer proximity of those properties to presumed construction annoyances (dust, vibrations, and noise). Those receiving 3% awards, though closer to the prospectively presumed garage-related annoyances (light and aesthetics), are more distant from construction annoyances.

3. *Pertinent Plaintiff Testimony.* Although the Plaintiffs who testified at trial gave varying accounts of the prospective impacts they feared, none of them testified that any of those prospective impacts would drive them from their homes. None testified that any of the threatened impacts would create a

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[18] *See* Damage Findings for Van Dyke (# 2(9)), Miller (# 2(10)), Zhang (# 2(11)); and Gariepy (# 2(12)); see also Mr. Spilker's valuations for these properties which assumes that the tower project had not been permitted. PX 272, 274, 275, 277.

[19] *See* Damage Findings for Bell (# 2(7)), Meis (# 2(8)), Flatt (# 2(3)), Loughhead (# 2(4)), Verplanken (# 2(5)), Rund (# 2(6)); PX 270, 271, 280, 283, 285. There is the anomaly of Loung Nguyen's property at 1750 Wroxton Court, which is in the zone of "moderate" foundation damage but that received an award representing a 15% reduction. *See* Jury Finding # 2(1); PX 286.

[20] *See* Damage Findings for Lam Nguyen (#2(2)), and Roberts (#2(13)); PX 263, 288.

[21] *See* Damage Findings for Powell (# 2(14)), Jennings (# 2(15)), Clifton (# 2(16)), Bell (# 2(17)), Baraniuk (# 2(18)), Reusser (# 2(20)), and Martin (# 2(24)); PX 273, 277, 279, 281, 282, 287, 290.

substantial risk to the health or safety of a person of ordinary sensibilities who might reside in those homes. In particular, as to the alleged impacts that the jury most likely relied upon in their liability findings – foundation damage, and possibly construction noise and garage lighting – the Plaintiffs adduced no evidence to prove that:

- the foundation damage would cause anyone's home to collapse (*see* Ellman, Tr. 11/26/13, at p. 61 ("I don't think these homes are going to collapse as a result of this"), or burn, or create some other hazard that would make the homes unsafe or unlivable;

- the garage lighting would cause anyone to lose sleep or experience any discomfort that could not be cured with curtains or blinds; or

- the construction noise, dust and vibrations would render the surrounding homes uninhabitable or leave anyone substantially at risk of bodily injury.

Indeed, several of the Plaintiffs testified that they bought their homes after the "Stop Ashby Highrise" publicity became widespread.[22]

4. *Testimony on the Extent of Foundation Damage*. The claim that the building will cause foundation damage to some of the surrounding homes is based upon a model that the soils beneath the building site are highly plastic. Based upon the assumption that the soil at certain levels is highly compressible (.06 C Sub r), Mr. Ellman predicted that the foundation of the building, as currently designed, would compress surrounding soils and cause the foundations of some of the adjoining properties to crack. Although the assumption of high soil compressibility underlying Mr. Ellman's prediction was hotly contested, the jury liability and damage findings suggest that the jury may have believed that the homes abutting the property would sustain some amount of foundation damage, and the jury found that the these properties have lost market value in the range of 12% to 15%.

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[22] Plaintiffs who bought their properties after the Developer received its foundation permit were Meis (purchased home in August 2008 for $495,000, Favre (April 2009 - $535,000), Gupta (June 2009 - $1,150,000), A. Bell (May 2011 - $650,000), Lin (September 2011 - $1,860,000), Jennings (December 2011 - $515,000), Reusser (May 2012 - $727,500), K. Bell (December 2012 - $495,000), and Oliver (March 2013 - $655,000).

It is important to recognize that the Plaintiffs tried their case on the theory that the Project foundation – as it was designed at the time of trial – would cause foundation damage to surrounding homes. The Project as it was *then* designed. The Plaintiffs did not plead or adduce any evidence to prove that the foundation design could not be *modified* to eliminate completely the risk of foundation damage, even if one were to accept as true Mr. Ellman's critical assumption about the compressibility of the soil. There was no evidence to show, for example, that the settlement problem predicted by Mr. Ellman cannot be avoided by simply extending the length of certain foundation piles into the deeper sand stratum that will support any remaining load at that depth without any compression of the overlying clay soils. The existence of this sand stratum at a depth of 110 feet was proved by the well borings performed before trial. *See* DX 143.

Mr. Ellman opined that improvements located on the ten abutting properties will sustain some amount of foundation damage if the Project, as designed at the time of trial, were built. *See* PX 363. He conceded, however, that he cannot predict with any certainty the extent of the anticipated foundation damage, except within broad ranges. *See* 11/22/13 Tr., pp. 102:2-8. ("My opinion is that there will definitely be an impact on the existing homes from the high rise construction. The impact will be within the moderate to severe range. Our ability to determine exactly whether it will be moderate or severe is limited; but one way - in either case, the high rise construction will impact the neighboring properties.").

In expressing the range of anticipated damage to each of the ten abutting plaintiff properties, Mr. Ellman used two categories – "moderate" and "severe." Six of the abutting plaintiff homes, he believes, will sustain "moderate" damage if the current foundation design is built; four he believes will sustain "severe" damage. *See* PX 363.

Within each of these categories, there could be a wide range of possible harm. Mr. Ellman used the term "moderate damage" to refer to effects ranging from minor cosmetic damage to structural damage that "could require some repair." *See* 11/22/13 Tr., pp. 61:12-15. Mr. Ellman clarified "structural damage" in this context to mean "wracking of windows and doors, you know, you can't open your door anymore, it

doesn't shut tight, the window won't close." *Id.*, at p. 61:19-22. Masonry damage, if any, could be easily repaired: cracks that "can be patched by a mason," recurrent cracks that "can be masked by suitable lining, so you could paint over it or put another covering over it, repainting of external brickwork and a possible small amount of brickwork to be replaced." *Id.*, at pp. 64:16 - 65:4.

In short, for six of the ten homes Ellman predicted foundation damage, the damages could be very slight and easily repaired. Thus, it is clear that damages will adequately compensate these Plaintiffs, if and when any such foundation damage ever occurs.

For the four homes that Ellman predicted "severe damage," he meant damage that would require "extensive repair work, involving breaking out and replacing sections of walls, especially over doors and windows, windows and door frames distorted, floors sloping noticeably, walls leaning and bulging noticeably, and some loss of bearing and beams and service pipes disrupted." *Id.*, at p. 63:21-64:3.

Although harm of this nature would undoubtedly affect the use and enjoyment of the properties until the damages could be repaired, there is no evidence that even "severe" damages of the type predicted by Mr. Ellman are irreparable. No evidence exists to prove that any of the foundation damage forecasted by Mr. Ellman, even in the worst case scenario, is severe enough to destroy any of the Plaintiffs' homes (*i.e.*, cause irreparable damage that would require rebuilding of the entire house or force the Plaintiffs to abandon their homes and relocate). There is no evidence that damage even in the worst case scenario would endanger the Plaintiffs' health. That is, even under Mr. Ellman's worst case scenario – which is not necessarily the same as the jury's prospective nuisance finding in its answers to Question 1 (more than a "petty annoyance") – the anticipated structural damage is of a nature that money damages could fully remedy. Furthermore, as Defendant will discuss below and prove at the balancing-of-the-equities hearing, the prospective settlement problem predicted by Mr. Ellman can be rendered moot by modifying the foundation design to extend certain piles deeper into the existing sand stratum.

5. *Testimony on Garage Lighting.* As noted earlier, it is pure speculation to assume that the jury considered lighting from the proposed High Rise garage as a determining factor in reaching its general nuisance findings for the prevailing plaintiffs whose properties are located outside of the zone of anticipated property damage. It is entirely possible that the jury was concerned with the aesthetics of the garage, or with construction noises, or with some other perceived use.

The 3% to 5% market value losses for those non-abutting properties suggest that whatever the nuisance will be, it will not significantly affect the quality of life. Even if viewed in a light most deferential to the jury's finding for the 20 prevailing plaintiffs, the anticipated harm from garage lighting will not make normal, everyday living unbearable in any of the Plaintiffs' homes.[23]

In the Settlement Agreement between the Defendant and the City of Houston (DX 9) (hereinafter, the "Settlement Agreement"), the Defendant has agreed to "ensure" that "the now existing adjacent residences are reasonably and practically screened from the direct impact of garage lighting and vehicle headlights inside the garage." *Id.*, at ¶ II.4.h. The Agreement further provides that "all exterior lighting fixtures, including any and all lighting fixtures on any amenity floor, must be hooded or directed away from the now existing adjacent residences, so that the light source is not visible from those residences." *Id.* The Settlement Agreement has been memorialized in a Declaration of Restrictive Covenants recorded against the Project site.

No evidence, much less evidence proving with reasonable certainty, was adduced to show that the Defendant will install a garage lighting system that does not comply with the Settlement Agreement. No evidence exists to prove that the City of Houston would not enforce this provision of the Settlement Agreement were the Defendant to breach it. It is pure speculation to assume otherwise, and the Court cannot issue an injunction based on a speculative harm.

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[23] And in any event, the garage lighting cannot serve as a basis for an injunction in any event because there are no pleadings to support it. *See* Charge Objections, 12/12/13 Tr., at pp. 27-28.

The Court and jury heard testimony from lighting expert John F. Bos, the Defendant's lighting designer. Mr. Bos's firm was hired by Defendant to "review the Settlement Agreement [with the City of Houston] and design the lighting in accordance with that agreement." *See* Tr. 12-10-13, at p. 136:18-21. Mr. Bos understands that the Settlement Agreement requires that the source of the garage lighting must be invisible to surrounding properties, and he has designed the garage lighting to comply with the Agreement. *Id.*, at pp. 138:25-136:10, 140:8-25, 148:1-14; 158:9-11. The exterior walls of the garage are designed at a sufficient height (42 inches) to block car headlamps (typically less than 36 inches) and also to intercept most light spill. *Id.*, at pp. 141:10 - 143:12. The interior light fixtures will be louvered to prevent the visibility of the light source from the surrounding properties. *Id.*, at pp. 142:25 - 145:17. If viewed from a distance of 32 feet, ambient light intensities from the garage will be comparable to a common street lamp. *Id.*, at pp. 157:15 - 159:5, 159:20 - 160:10.

Over objection, Mr. Grossman, an architect who has an admitted bias in the case, testified on the prospective garage lighting. Mr. Grossman's opinions disregarded the Settlement Agreement. He assumed that the lighted bulbs hanging from the light fixtures in the garage would be visible to the surrounding properties because certain ceilings in the garage were higher than others. *Id.*, at pp. 202-03. He opined that spill lighting from the proposed Project garage would be five times brighter than spill lighting from a single family home (5-foot candles vs. 1-foot candle), a magnitude of intensity that he believes would annoy residents on the south side of the Project. *See* 11/21/13 Tr., at pp. 206-207.

All of these opinions are suspect. Mr. Grossman did not and cannot opine on whether the City of Houston will enforce the portion of the Settlement Agreement that requires all light sources in the garage to be shielded and hidden from view of the surrounding properties. Thus, his opinions about the Project having any direct lighting effect are pure speculation. In addition, he failed to account for the fact that the garage lights would be mounted on chains that can be easily adjusted to prevent the light sources from being seen from the ground. Thus, his opinions about the visibility of direct light sources are unreliable because

they fail to account for this simple solution to the problem of visible light sources.

Mr. Grossman's opinions are also flawed because they lack any frame of reference. He did not support his opinions with any tests or studies to enable him to quantify the anticipated intensity of the spill lighting he predicts. His methodology was simply to compare the proposed Project lights to the lights in a few other typical garages in the city, which he had photographed. None of these other garages had lighting identical to the lighting system designed for the Project. Grossman made no attempt to calculate the delta between the garage lighting as proposed for the Project and lighting that is usual and customary for mid-rise structures that are common in the same area of the inner city.

In weighing the equities, the Court must assume that the Project site, whether it is developed with a garage, or mid-rise apartments, or commercial businesses, or with the Project currently planned for that site, will be illuminated. The starting point for evaluating the harm cannot be the assumption that the site will persist in its current state of total darkness. In summary, there is no evidence, let alone evidence to prove with reasonable certainty, that the proposed High Rise garage will cause a level of annoyance substantially different than what the neighboring properties endured for years in proximity with the Maryland Manor apartments or the level of lighting that would be reasonable for them to endure in the future if the property were developed for high density multi-family and/or commercial uses common in that area of the densely developed inner city.

6. *Testimony on Construction-Related Annoyances.* The pleadings in this case do not allege any nuisance effect due to construction annoyances, and the evidence of construction activities was largely anecdotal. In describing the type of foundation designed for the Project, Mr. Ellman distinguished between the auger cast pile system planned for the Project (which are constructed from steel reinforced grout and poured into holes drilled into the soil) and driven piles (which are hammered into the soil). *See* 11/26/13 Tr., at pp. 34-36. Mr. Ellman acknowledged that drilling holes for auger-cast piles was far quieter than hammering piles; however, he added that drilling piles does generate noises caused by the mechanical

equipment and compressors. *Id.*, at p. 35:22 - 36:8. This activity, he said, would take four to six months to complete (approx. 600 piles @ 2-3 per day). *Id.*, at p. 37:10-16.

Generally, construction noises are not a nuisance because they are an inevitable part of the ever-evolving, built-up urban landscape, which urban dwellers must tolerate. *See, e.g., Celebrity Studios, Inc. v. Civetta Excavating Inc.*, 72 Misc. 2d 1077, 340 N.Y.S.2d 694 (App. Div. 1973) ("Certainly, in any vital, bustling, changing city, demolition and construction will be part of the daily scene. Construction and demolition are noise-generating activities that are bound to have an impact on all nearby."). In the present case, the Plaintiffs offered evidence that the construction of the Project would be noisy, but they offered no proof of the extent to which the noise at this construction site would be any different than construction annoyances typical of any large inner city construction project, such as those numerous examples now underway in the same area. *See Pande Cameron & Co. of Seattle, Inc. v. Cent. Puget Sound Reg'l Transit Auth.*, 610 F. Supp. 2d 1288, 1306 (W.D. Wash. 2009) (rejecting a complaint of loud noises, vibrations, and dust and debris generated by construction project, because "Plaintiffs have failed to demonstrate if or how the construction produced noise, vibrations, and dust beyond that typical to any major downtown construction project").

Inevitably, constructing a building of any type is noisy. However, it is not and cannot be the law that construction can be enjoined simply because it is noisy. Accordingly, there is no basis in the pleadings, the jury's findings, or the evidence that justifies enjoining this Project simply because it is anticipated to create some unspecified amount of noise.

V. HARM POSED BY THE INJUNCTION TO THE DEFENDANT.

A. Cognizable Harms to Defendants.

In the appellate opinions that have reviewed a trial court's weighing of the equities, there are several common harms to the defendant that have been recognized:

1. *Investment costs.* Courts may consider the loss of the Defendant's sunk costs as a harm to be imposed by granting the requested injunction.[24] Weight is added where costs were invested before the plaintiff protested the project in question.[25]

2. *Cost to replace offending equipment or machinery.* If the nuisance can be mitigated by replacing equipment or by a certain method of operation, the court will consider the cost of such alternative method or machinery.[26]

3. *Relocation costs.* In weighing the equities, courts assess the anticipated cost to the defendant of moving the business to another location where it will not pose a nuisance to surrounding properties.[27]

4. *Survivability of the business.* Courts weigh heavily the fact that the injunction, if granted, would drive the defendant out of business.[28]

5. *Loss of natural right to use one's property for an otherwise lawful purpose.*[29]

6. *Loss of anticipated profits.*[30]

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[24] *See Garland Grain Co. v. D-C Home Owners Improv. Asso.*, 393 S.W.2d 635 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.) (in reversing injunction prohibiting feed lot operation, court considered fact that, in acquiring land and commencing operations, defendant had invested $166,000.00 "and would, no doubt, suffer a substantial financial loss if forced to move or discontinue the business"); *Hill v. Villarreal*, 383 S.W.2d 463 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.) (total construction and equipment costs in constructing rendering plant considered).

[25] *Hill*, 383 S.W.2d at 465-66 (defendant bought the land, contracted the construction of the building and ordered the equipment with a significant total expenditure ($29,000), before any objection to the plant was made).

[26] *See Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (where plaintiff homeowners sought to enjoin defendant apartment owner from using outdated air conditioner because of excessive noise, court considered replacement cost of quieter air conditioner).

[27] *Storey*, 226 S.W.2d at 612 (considering relocation costs for rendering plant).

[28] *See, e.g., Storey*, 226 S.W.2d at 612 (order prohibiting rendering operation would put defendant out of business); *Schiller v. Raley*, 405 S.W.2d 446, 447 (Tex. Civ. App. – Waco 1966, no writ) (prohibiting feed lot put defendant out of business).

[29] *Hot Rod Hill Motor Park v. Triolo*, 276 S.W.3d 565 (Tex. App.—Waco 2008, no pet.) (determining that an injunction which prevented the defendant from operating his business was a significant harm to the defendant irrespective of the unprofitability of the business).

[30] *Jewett v. Deerhorn Enterprises, Inc.*, 281 Ore. 469, 575 P.2d 164, 169 (Or. 1978) (projected profits from stockyard).

B. Anticipated Harms to Defendant 1717 Bissonnet.

An injunction prohibiting the construction of the Project could cause enormous harm to the Defendant. The Defendant's investment costs in this Project are $14,733,945.11, of which all could be lost depending on the scope of the injunction. In addition, an injunction will deprive the Defendant of millions in lost profits and tens of millions in anticipated profits. In short, the Defendant stands to lose financial resources at more than a 10-to-1 ratio to the collective losses of the twenty prevailing Plaintiffs.

The Court should also consider the timing of the nuisance suit in this case – May 1, 2013. Maryland Manor was generating an average of $19,500 in net cash flow per month on a stabilized basis in 2012 before the Developer started terminating leases. Tenant move-outs began in January 2013. The apartments were completely vacant by March 31, 2013. Demolition work commenced in the last week of April 2013. Had the nuisance suit been filed earlier, the Defendant would not have vacated its apartments and lost a year worth of rents.

VI. HARM POSED BY THE INJUNCTION TO THE PUBLIC.

A. Cognizable Public Interests

The interests of third persons and of the public are factors to be considered in determining the appropriateness of an injunction against a nuisance. *See, e.g.*, RESTATEMENT (2d) OF TORTS, § 942; *see also id.*, at comment a ("The interests of identifiable third persons, not parties to the tort or to the injunction suit, the public interests of the local community and the interests of the public in various social policies, must often be balanced against other factors in the determination of the appropriateness of injunction against tort"). As the Supreme Court has stated:

> In modern society, however, industries and nuisances often come in much larger packages, with effects on the public, the economy, and the environment far beyond the neighborhood. A court sitting in equity today must consider those effects by balancing the equities before issuing any injunction.

Schneider Nat'l Carriers, Inc., 147 S.W.3d at 287.

In nuisance cases, Texas courts have weighed the following types of public interests in determining the appropriateness of injunctive relief against a particular project or activity:

1. *Public need served by continuation of the business*: Courts always consider the public need for the condition or activity targeted by the proposed injunction.[31]

2. *Prospective loss of economic benefits for the community*: The potential economic boost for the community is a weight factor to be balanced.[32]

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[31] *See, e.g., Hill*, 383 S.W.2d at 465-66 (rendering plant – "helps to conserve what would otherwise be wasted and helps to afford an efficient and economical means of disposing of dead animals, scraps and offal"); *Hall v. Muckleroy*, 411 S.W.2d 390 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.) (livestock auction barn – a business that enabled farmers, ranchers and livestock owners in several counties to market annually livestock of a value in excess of 3 million dollars. There is evidence that this business is an asset to the City of Kirbyville and to the community generally, greatly in excess of any damage plaintiff has suffered."); *Garland Grain Co.*, 393 S.W.2d at (cattle feeder pen – "performs a service for the welfare of the general public and that it is the only operation of this sort in this section of the state and that the business is particularly adaptable to this section of the state because of the available supply of cattle and feed supplies, as well as a ready market for the sale of fresh meat"); *Texas Lime Co. v. Hindman, 300 S.W.2d 112, 123 (Tex. Civ. App.—Waco),* (lime production plant – "a lawful, useful and necessary business, and that it does and has contributed to the welfare and prosperity of the community in which it is located, as well as to the health and welfare of the people of the State of Texas), *aff'd in relevant part, 157 Tex. 592, 305 S.W.2d 947 (1957)*; *Galveston, H. & S. A. R. Co. v. De Groff*, 102 Tex. 433, 118 S.W. 134, 143 (1909) (railroad switching yard – "The public convenience is of controlling importance in this class of cases, especially is it so in this case wherein it is shown that this railroad company carries the freight and passengers for El Paso over a large scope of country and also carries the through travel and traffic which reaches it over the Southern Pacific as well as that which the G., H. & S. A. Railroad Company receives from and delivers to other roads"); *Oliver v. Forney Cotton Oil and Ginning Co.*, 226 S.W. 1094, 1098 (Tex. Civ. App. 1921, no writ) (cotton gins – "absolutely essential to the welfare of that industry, and it cannot be a sound rule of public policy nor a just rule of law which would outlaw them or require their owners, no matter how much care may have been exercised and expense incurred in locating them, to move them elsewhere, merely because they result in some annoyance or discomfort to a family which has taken up its residence on adjacent property long after such gins have been located.").

[32] *See, e.g., Lee v. Bowles*, 397 S.W.2d 923, 926 (Tex. Civ. App.—San Antonio 1965, no writ) (in suit to enjoin race track due to noise pollution, court considered "evidence that automobile racing is the second most popular sport in the United States from the standpoint of number of paid spectators, and is gaining in popularity; that this track would help the economy of the area and stimulate tourist trade"); *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) (balance of harms did not tip in environmental organization's favor where a Forest Service project would "further the public's interest in aiding the struggling local economy and preventing job loss"); *Earth Island Inst. v. Carlton*, 2009 U.S. Dist. LEXIS 74066, at *92, 2009 WL 9084754 (E.D. Cal. Aug. 20, 2009) (in weighing equities for issuance of injunction to prevent logging, court considered that "the public will lose the benefit of a boost to the local economy as a result of the creation of jobs by the Project").

3. *Loss of tax revenues to the community.* Weight should be assigned to the loss of tax revenues that would result from shutting down a business.[33]

B. Public Harm from Plaintiffs' Proposed Injunction.

Injunctive relief in this case will deprive the public of significant benefits.

Housing is an essential human need. The City of Houston, and the Texas Medical Center in particular, is undergoing a phase of rapid, unprecedented growth. The Project has been designed to provide high-quality apartment housing that is desperately needed in the Texas Medical Center area. Fully leased, it will be home for 232 households, estimated to comprise between 300 to 350 Houstonians. When completed, the Project will attract many medical professionals (doctors, medical residents, and other key health professionals), as well as older retirees for whom proximity to the Medical Center could be of paramount concern. Proximity to the Texas Medical Center for those tenants could mean the difference between life and death.

Moving the building somewhere else is not a valid alternative in this case. The highly desirable Project site location is unique – close to cultural amenities such as museums, Hermann Park, the Houston Zoo, educational and employment centers such as Rice University, the Texas Medical Center, and Downtown Houston. This Project will make housing available to a growing number of potential residents who are willing to pay for the quality of life offered by a residence in that location and not available anywhere else in the City of Houston.

The development costs for the Project will approximate $100,000,000.00. The development of the Project will support an estimated 2,200 to 2,850 full-time equivalent jobs in the local economy, and the ongoing management and maintenance of the building will support hundreds more after it is built.

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[33] *See* RESTATEMENT (2d) OF TORTS, § 942, comment c ("The local community sometimes has a public interest at stake. For example, it will suffer loss of taxes and purchasing power of workers if an industrial plant that has been found to be a nuisance is ordered to be shut down or moved to another location. Here the community interest appears to carry weight on the side of the defendant.").

The Project, when built, will add an estimated $66,400,000 in taxable value to the local ad valorem tax base during its first year of stabilized operations alone. At current tax rates, the completed Project will contribute an estimated $1,699,500 *during just this first year* to the operations of local taxing units. The Plaintiffs' prospective damage is $1,661,000 for *all time*, even counting the double recovery of lost use and enjoyment.

An injunction that would prevent the Developers from using their property for its highest and best use would pose economic harm to both Houston and Texas in that it threatens to create an immediate and economically debilitating statewide chilling effect on the development of new real estate projects subjectively deemed as an inappropriate or undesirable "fit" for the surrounding area. Unlike zoning laws which specify in advance the types of developments permitted in any given area, the use of common law injunctions to bar lawful developments that are deemed by a jury to be "out of place" in a mixed, unzoned area will foster unpredictability and stifle investment. The result will be more conservative investment and underwriting criteria in order to compensate for it, thereby reducing economic benefits to the public such as alternative housing availability and job growth by making it more difficult for developers to undertake new projects in the first place.

VII. IMMINENCE OF HARM.

The party seeking an injunction must establish that the defendant "will engage in the activity enjoined." *State v. Morales*, 869 S.W.2d 941, 946 (Tex. 1994). "[T]he question of whether imminent harm exists to warrant injunctive relief is a legal question for the court, not a factual question for the jury." *Operation Rescue-National v. Planned Parenthood*, 975 S.W.2d 546, 554 (Tex. 1998) (citing *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979)).

Where a defendant voluntarily changes its conduct as a result of litigation, courts are concerned that the challenged conduct might start up again in the absence of judicial intervention. *See Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 189 (2000). The burden thus rests with the defendant

to persuade the Court that the challenged conduct would not reasonably be expected to recur. *Id.*

Following the jury verdict, the Developer decided to modify the design of the Project to obviate the potential harms that may have prompted the verdict. These modifications are as follows:

(1) **Enhanced Foundation Design.** The 71 auger-cast piles underneath the two main shear wall boxes at the southwest and southeast corners of the garage will be lengthened an average of twenty feet each, so that their tips extend at least two feet into the permanent sand layer existing approximately 110 feet below the surface. This enhancement of the foundation design of the building will eliminate the threat of settlement of the underlying soils and the risk of foundation damage to the surrounding properties, even if, *arguendo*, Mr. Ellman's assumptions are assumed true.

(2) **Garage Light Screening.** To further mitigate light from the garage beyond the requirements of the City of Houston Settlement Agreement, the Developer will add decorative screening to garage openings and install motion sensors to activate lights.

(3) **Privacy Screening.** The Developer will add continuous planters along the parapet wall of the sixth-floor amenity deck, to prevent occupants from having the ability to look straight down onto the abutting properties.

Accordingly, since the prospective harm of the Project as proposed at the time of trial is no longer imminent, an injunction to enjoin the Project as it was then proposed is moot.

VIII. IRREPARABLE HARM AND ADEQUACY OF FUTURE LEGAL REMEDY (DAMAGES).

As noted above, one of the essential elements of the Plaintiffs' cause of action for a permanent injunction "is a showing that [they have] suffered or will suffer irreparable harm for which there is no adequate remedy at law." *Parkem Indus. Servs., Inc. v. Garton*, 619 S.W.2d 428, 430 (Tex. Civ. App.--Amarillo 1981, no writ). *See also Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d at 287 (stating in the nuisance context that "[a] permanent injunction issues only if a party does not have an adequate legal remedy. If there is a legal remedy (normally monetary damages), then a party cannot get an injunction too.").

Whether a damages remedy is inadequate is intertwined with the issue whether an injury is irreparable. *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 294 (Tex. App.—Beaumont 2004, no pet.) An injury is "irreparable" only if it cannot be undone through monetary remedies. *See*, e.g., *Parkem Indus.*

Servs., Inc. v. Garton, 619 S.W.2d at 430 ("'irreparable injury' is an injury which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard."). "Adequate remedy at law preventing relief by injunction means a remedy which is plain and complete, and as practical and efficient to the end of justice and its prompt administration as a remedy in equity." *Hancock v. Bradshaw*, 350 S.W.2d 955, 957 (Tex. Civ. App.—Amarillo 1961, no writ). These related questions are for the trial judge to decide, not the jury. *See Baucum v. Texam Oil Corp.*, 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967)("the question of the adequacy of the remedies is one for the judge, clothing him with wide discretion in passing on same. It is not a jury question."). "The party requesting the injunction has the burden of negating the existence of adequate legal remedies." *Hancock v. Bradshaw*, 350 S.W.2d at 957.

In nuisance cases, the fact that the nuisance is found to interfere with the use and enjoyment of residences is not dispositive of whether damages are an adequate remedy. In *Storey v. Central Hide & Rendering Co.*, the Supreme Court addressed whether homeowners were entitled to an injunction to enjoin the operation of a hide rendering plant located near the plaintiffs' homes. The jury found that the rendering plant was operating as a nuisance, and, on the basis of the verdict, the trial court permanently enjoined the operation of the business. *Id.*, 226 S.W.2d at 617.

In a split decision, a majority of justices of the Texarkana Court of Civil Appeals reversed and dissolved the injunction, concluding that the record did not present a disproportionate balance of equities and stated: "We have reached the conclusion that appellees are not entitled under the facts and circumstances of this case to a permanent injunction prohibiting the operation of appellant's rendering plant *for the reason that they have an adequate legal remedy for damages*." *Central Hide & Rendering Co. v. Storey*, 223 S.W.2d 81, 83 (Tex. Civ. App.—Texarkana 1949) (emphasis added), *aff'd*, 148 Tex. 509, 226 S.W.2d 615 (1950).[34] The plaintiff homeowners were thus relegated to recovery of damages only. *Id.* This

[34] A dissenting justice would have affirmed the injunction because of the special status of the plaintiffs' homes. *Id.* at 83-84 (Hall, J., dissenting). Justice Hall noted that "terrible stench and foul odors emanated from appellant's rendering plant, and entered appellees' homes which made them uninhabitable," and that "[t]he injury to appellees' health or the danger of some injury thereto and the deprivation of the use of their homesteads constitutes

holding was approved by the Supreme Court, which wrote in a unanimous opinion: "An abatement of a lawful place of business is a harsh remedy, and we believe the Court of Civil Appeals majority opinion has correctly disposed of this cause. 39 AM. JUR. p. 420, § 153." *Storey*, 226 S.W.2d at 618. The Supreme Court cited the fact that the nuisance found by the jury would not destroy the plaintiffs' homes. *Id.* at 617.

In this case, as the jury verdict reflects, the Plaintiffs injuries can be remedied by money damages. And it is important to note that the prospective damages found by the jury in this case were fairly minor, only an average lost market value of 5.93% for the twenty prevailing Plaintiffs.

It is also true, however, that an award of money damages is not ripe at this time. Therefore, the Defendant has contended that the jury findings cannot be awarded in any final judgment. However, if, as and when the Project is built and consequently causes a nuisance, at that time a claim for damages will accrue. And if and when damages do ever accrue, the Defendant and its agents will have sufficient equity in the building and insurance coverage in place to satisfy any damage award in the magnitude awarded by the jury in this case.

No proof exists that money damages cannot adequately remedy the sorts of threatened injuries at issue. No evidence exists to prove that any of the impacts in question are of the sort that will drive the Plaintiffs from their homes. No evidence exists to show that the foundation damage predicted by Mr. Ellman cannot be fully repaired. No evidence exists to prove that the inevitable and temporary noise of drilling auger-cast foundation piles for this Project will render everyday life intolerable in the surrounding homes. According to Mr. Ellman, the foundation will be complete in four to six months. The noise, therefore, can only be a temporary nuisance at worst, which can be compensated in damages for lost use and enjoyment. Nor is there any evidence that the lights in the prospective garage will prevent the Wroxton Court Plaintiffs or any of the other Plaintiffs from living comfortably in their homes and sleeping soundly

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an irreparable injury." *Id.*

in their beds. It was uncontroverted that spill lighting from the garage in the magnitude of 4.5 to 5.0 candelas can be blocked with blinds and shades.

Accordingly, the Court should not resort to the extreme sanction in this case of prohibiting this Defendant from proceeding with this fully-permitted, lawful, and publicly beneficial Project. To the extent the building poses any nuisance for any of the Plaintiffs when it is built, damages will make those Plaintiffs whole.

IX. IMPRACTICALITY.

According to the Second Restatement of Torts, "the practicability of drafting and enforcing an order or judgment for an injunction is one of the factors to be considered in determining the appropriateness of injunction against tort." RESTATEMENT (Second) OF TORTS § 943 (ALI 1979); *see also Perel v. Brannan*, 267 Va. 691, 594 S.E.2d 899, 905 (Va. 2004) ("[A] requested remedy may be denied if . . . the decree would necessarily be of the type whose enforcement would 'unreasonably tax the time, attention and resources of the court.'") (citations omitted)); AM. JUR. 2d Injunctions § 23 ("Under the maxim that equity will not do a vain thing, relief in an injunction will be denied if it is impracticable or impossible for the court to supervise or to enforce the future performance required by the injunction.").

The injunction sought in this case would be impractical to administer. The Plaintiffs tried the case on the theory that the Project as a whole, as it was designed at the time of trial, will constitute a nuisance if it is built. Twenty of the Plaintiffs received liability findings that the Project, as then designed, will constitute a nuisance in some indeterminate way. The injunction sought by the pleadings seeks an equally indeterminate order of this Court – to prohibit the construction of the Project as designed as of the time of trial. As indicated above, the Defendant already has plans to modify the design proposed at trial. The Defendant will modify the foundation to obviate the prospective settlement issues predicted by Mr. Ellman; the Defendant will add screening and light sensors to further mitigate the visibility of the garage lighting; and the Defendant will create a privacy buffer on the amenity deck to remove a vantage point from which

occupants on the deck would be able to look into the yards of the abutting residents. Thus, the injunction sought will be mooted by the remedial changes already contemplated by the Developer.

Presumably, the Plaintiffs will then return to Court to request a new or modified injunction, and the process will never end. The Court should not allow itself to be enlisted as a land planner to review and evaluate each new design. Injunctive relief is therefore inappropriate in this case.

X. CONCLUSION.

For the foregoing reasons, the Defendant requests the Court to deny injunctive relief in this case. Alternatively, and without waiving the foregoing, the Defendant requests that the Court prepare findings of fact and conclusions of law to justify any injunction. Defendant requests any and all further relief to which it may be entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

CAUSE NO. 2013-26155

PENELOPE LOUGHHEAD, ET. AL	§	**IN THE DISTRICT COURT OF**
	§	
V.	§	**HARRIS COUNTY, TEXAS**
	§	
1717 BISSONNET, LLC	§	**157th JUDICIAL DISTRICT**

DEFENDANT'S RESPONSE TO PLAINTIFFS' BRIEF REGARDING ISSUES RAISED AT MARCH 31 HEARING

Defendant 1717 Bissonnet, LLC (hereinafter, the "Developer" or "Defendant") will respond to the Plaintiffs' brief regarding issues raised at the hearing on balancing of the equities, held on March 31, 2014.

I. Plaintiffs' Burden of Proof Revisited.

In their post-hearing brief, Plaintiffs make the astounding argument that the Defendant bore some burden of production and proof to show that "a modified project would constitute a nuisance." Pl. Br., at p. 1. Before even considering the merits of this argument, it can be properly rejected as simply a red herring. The Plaintiffs have prayed for a hopelessly vague, yet narrow injunction - one that prohibits the Project as proposed at the time of trial. They challenged the design as a whole, and they seek to enjoin it as a whole.[1] The Plaintiffs do not seek an injunction that prohibits any other alternative design. They did not request, much less obtain fact findings that each and every one of the individual design features that they complained of will each create a nuisance. Thus, the injunction they have prayed for, even if granted, does not foreclose the Defendant from modifying design features of the original proposal that will result in a different Project that is outside of the injunction.

As to the merits, it is so well settled that the plaintiff bears the burden of proof to establish all of the requisite elements for injunctive relief,[2] that the response to the Plaintiffs' attempt to invert the burden of

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[1] Plaintiffs were asked, by way of Defendant's Second Set of Special Exceptions, to specify what they wanted to enjoin and they refused and opposed that special exception, which was denied.

[2] *See, e.g., Priest v. Tex. Animal Health Comm'n*, 780 S.W.2d 874, 875 (Tex. App.—Dallas 1989, no writ) ("A successful **applicant** for injunctive relief must demonstrate the following four grounds for relief: 1) the existence of a wrongful act; 2) the existence of imminent harm; 3) the existence of irreparable injury; and 4) the absence of an adequate remedy at law.") (emphasis added); *Operation Rescue-National v. Planned Parenthood*, 937 S.W.2d 60, 70 (Tex. App.— Houston [14th Dist.] 1996) ("To be entitled to permanent injunctive relief, **the plaintiffs** must plead and prove a valid cause of action against the defendants."), *aff'd*, 975 S.W.2d 546 (Tex. 1998)).

proof will simply point out the obvious. As the Supreme Court has noted in the nuisance context:

> In general, a permanent injunction "must not grant relief which is not prayed for nor be more comprehensive or restrictive than justified by the pleadings, the evidence, and the usages of equity." 6 L. Hamilton Lowe, TEXAS PRACTICE: REMEDIES § 244 at 237 (2d ed. 1973). **Nor should a decree of injunction be so broad as to enjoin a defendant from activities which are a lawful and proper exercise of his rights.** *Villalobos v. Holguin*, 146 Tex. 474, 208 S.W.2d 871, 875 (Tex. 1948). **Rather, "injunctions must be narrowly drawn and precise."** *Brown v. Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir. 1992).

Holubec v. Brandenberger, 111 S.W.3d 32, 39-40 (Tex. 2003) (emphasis added).

In short, in a nuisance case, it is not the defendant's burden to seek leave of court to use the defendant's land. Nor is it the defendant's burden to plead or demonstrate that some alternative use can be made of the property without creating a nuisance. Rather, the injunctive decree must be based on the pleadings and upon proper findings that an actionable nuisance exists, and cannot be drawn "so broad as to enjoin a defendant from activities which are a lawful and proper exercise of his rights." *Holubec*, 111 S.W.3d at 39-40; *Hall v. Seal*, No. 04-09-00675-CV, 2011 Tex. App. LEXIS 27, at *11, 2011 WL 61631 (Tex. App.—San Antonio Jan. 5, 2011, pet. denied) (mem. op.) ("A trial court . . . abuses its discretion by entering an injunction that is so broad as to either grant plaintiffs more relief than they are entitled to or enjoin defendants from conducting lawful activities and exercising legal rights.").

The Plaintiffs contend that two cases invert the burden of proof to require the defendant to negate that its proposed use of the land will be a nuisance: *Pool v. River Bend Ranch, L.L.C.*, 346 S.W.3d 853 (Tex. App.—Tyler 2011, pet. denied), and *Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212 (Tex. App.—Houston [14th Dist.] 1989, writ denied). Neither case places the burden of proof or persuasion on any issue upon the defendant.

Pool was a case in which the plaintiff sought a very broad injunction - to prohibit the use of the defendants' property as a commercial all-terrain vehicle (ATV) park. This would be the equivalent of the Plaintiffs in our case seeking an injunction against all types of high rise structures on the Defendant's tract.

In *Pool*, the case was tried to the bench, and the court made a very broad finding, that "**[a]ll** of the all terrain vehicle events and motocross events that occurred on the Defendants' property substantially interfered with the Plaintiff's and Intervenors' use and enjoyment of the property they own." 346 S.W.3d at 858-59 (quoting FF No. 23) (emphasis added). And the injunction granted was equally broad -- a ban on all commercial ATV use. *Id.* at 855. (Private ATV use was not prohibited).

On appeal, the defendant argued that the ban on all commercial ATV use was too broad. The appeals court rejected this argument, pointing out that if the defendant wanted to make that argument the defendant should have put evidence in the record to show that not all commercial ATV use will substantially interfere with the plaintiff's use and enjoyment. *Id.*, at 860

Pool clearly does not shift the burden of proof or persuasion. It simply refers to a shift in the burden of production when the plaintiff-applicant has satisfied his burden of proof to support the broad injunction requested. In the present case, the Plaintiffs have not alleged or secured findings that all high-rises are bad -- they have only attacked this one particular proposal, which consists of many design elements. Unlike the plaintiff in *Pool* who sought and obtained a finding that "all" types of commercial ATV activities constitute a nuisance, the Plaintiffs in this case did not request, or obtain findings that all of the design elements of the Project would create a nuisance. The broad-form of the Plaintiffs' proposed jury question, which the Court submitted, leaves the parties and the Court guessing about which design element, if any, prompted the jury to find the proposed Project a prospective nuisance. In the present case, therefore, the Plaintiffs have not sought to condemn all potential alternatives, so the issue of alternative designs was not before the Court. Therefore, the burden of production never shifted to the Developer to show that any alternative design is not a nuisance.

It should be recalled that during the March 31, 2014, hearing, the Developer did adduce evidence to prove that the foundation problems predicted by Mr. Ellman will be completely obviated by deepening the piers of the foundation. Therefore, the Developer has produced evidence of an alternative to a greater

setback that will completely solve the feared foundation problem, even if the soil plasticity is as Mr. Ellman has opined.

In *Freedman*, as the Plaintiffs acknowledge, the defendant simply offered proof at trial that its parking lot could include design features to mitigate the problem at issue. There is nothing in that opinion to suggest that the defendant must lay out all potential proposals for jury review, or forfeit the right to devote the property to an alternative use that has not been challenged.

II. Objections to Plaintiffs' Proposed Injunction.

The Developer objects to the substance of the Plaintiffs' proposed injunction for all reasons set out in the Defendant's Motion for JNOV/Disregard, Defendant's Reply to the Plaintiffs' Response to the Defendant's Motion for JNOV/Disregard, and in Defendant's Trial Brief on Balancing the Equities. Each of those grounds for denying injunctive relief are incorporated as if fully set out herein.

In addition, the Developer objects to the form of the proposed injunction on the following grounds:

A. Misstatement of Jury Findings.

1. *Misstatement of "The Project."*

On page 2 of the proposed injunction, the Plaintiffs correctly recite that the Jury Charge defined "the Project" to mean "the 21-story mixed use building that 1717 Bissonnet proposes to construct at the corner of Bissonnet and Ashby Street." *Id.* However, on page 3 of the proposed injunction, the Plaintiffs misstate the definition in its recitation of the jury's finding, asserting that the jury found:

> that the proposed 21-story mixed use building that is proposed **and currently permitted by the City of Houston** constitutes an immediate nuisance to twenty-nine Plaintiffs (twenty homes) involved in this action.

Prop. Pl. Inj., at p. 3 (emphasis added).

The Court will recall that during the charge conference the Defendant objected to the definition of "the Project" by the Charge and tendered the following Instruction No. 5:

> The "Project" means the 21-story mixed use building that 1717 Bissonnet has proposed to construct at the corner of Bissonnet Road and Ashby Street **and which the City of Houston has approved.**

See 12/12/13 Tr. 26-27, Prop. Instr. # 5 (emphasis added). This instruction was rejected.

The basis for the objection was the fact that the Plaintiffs, during trial, attempted to persuade the jury that the Developer was planning to breach and circumvent the plans and settlement agreement with the City, and that the Court's charge was ambiguous as to whether "proposed" Project would mean (a) the permitted and approved proposal, or (b) the allegedly secret proposal, that involved adding trips to the Project and garage lighting that would not be shielded from view.

The specific objection, which sought to remove the ambiguity, is as follows:

> Proposed jury instruction No. 5 is requested because the definition of [P]roject is not limited by what the city of Houston has approved the developers to build. The current definition allows the jury to speculate whether discussions among the developers and emails introduced into evidence reflects what is currently proposed, despite the absence of any city approval for some of those suggestions. It also allows the jury to speculate about whether the proposed building is something other than what the city has approved, either in permit approvals or in the settlement agreement between the defendant and the city. It also goes to the point that I made earlier that one of the elements of a claim to enjoin a prospective nuisance has to be that the project is imminent; and without there being any constraint on what the proposed project is, it's impossible to tell from the jury's finding whether the proposal that the jury thinks is the proposal is one that's even imminent or could be imminent because it doesn't have city approval.

See 12/12/13 Tr. 26-26.

The decretal of the injunction the Plaintiffs propose now attempts to remove the objected-to ambiguity of the Jury Charge *they requested* for the obvious purpose of prejudicing the jury to believe that the Developers planned to build something other than what the City has approved and permitted. The proposed injunction would enjoin the Defendant:

> from constructing the proposed 21-story multi-use building on the property located at 1717 Bissonnet **that is permitted by the City of Houston. The currently permitted plans for the proposed building that is permanently enjoined are attached hereto as Exhibit A.**

Pl. Prop. Inj., at p. 5 (emphasis added).

This decretal is not supported by the jury's findings, which are based on a different definition of "the Project."

In addition, the Plaintiffs have erroneously invited the Court to apply their new definition of "the Project" in the proposed recital relating to irreparable harm: "The Court further finds that the Plaintiffs will suffer irreparable harm and injury if the Defendant is allowed to proceed with the construction of the 21-story multi-use building that the Defendant has proposed and obtained permits from the City to build." Pl. Prop. Inj., at p. 5. At trial the Plaintiffs claimed that the Developer intended to build a Project that exceeded the permits and approvals given by the City, and this was the case they tried. It is fundamentally unfair to assume that the jury found that the permitted Project is the nuisance the jury had in mind.

2. *No Jury Finding of Immediate Harm.*

On page 3 of their proposed injunction, the Plaintiffs include a recitation that the jury found that the Project constitutes "an **immediate** nuisance to twenty-nine Plaintiffs (twenty homes) involved in this action." Prop. Pl. Inj., at p. 3 (emphasis added). This is false. No question was asked about whether the prospective harm was imminent. Indeed, as the Defendant proved at the March 31 hearing, the original proposal has been modified to address foundation, garage lighting, and potential vantage points from the amenity deck. The prospective harms tried to the jury are no longer imminent.

B. Deprivation of Jury Trial on Material Fact Issues.

After a long, self-serving mischaracterization of evidence (pp. 3-4), the Plaintiffs' proposed judgment would have the Court make granulated findings as to specific nuisance impacts:

> The Court is of the opinion that the majority of the evidence at trail regarding how the proposed building will interfere with the neighboring residents' use and enjoyment of their homes was the result of (i) the parking garage of the proposed building, and the fact that it will be placed ten (10) feet form the adjacent residences and will include five stories of above-ground parking with an amenity deck on top; and (ii) the size, density, and egress to/ingress from the proposed building.

Pl. Prop. Inj., at p. 4.

In an injunction action, a litigant has the right to a trial by jury on the "ultimate issues of fact." *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979). The liability issues were tried to a jury. Defendant objected to the broad form submission of the liability question, precisely because, if answered affirmatively, it would provide no guidance on what specific impacts would cause a nuisance if the Project, as then proposed, were built. The global liability findings mask the jury's rationale. During the charge conference, the Court asked Plaintiffs' counsel whether she desired for the case to be submitted on a broad-form question, and she said she did. For the Court to now step in and make these specific, granulated findings of nuisance impacts – when the Plaintiffs purposefully prevented the issues from being asked of the jury specifically – is an effrontery to the process and would deprive the Defendant of the right to trial by jury on those issues.

C. Advisory Opinion.

Texas courts have no jurisdiction to render advisory opinions. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). The entire last paragraph that begins on page 4 of the proposed injunction and carried over to page 5 is simply an advisory opinion.

D. Potential Overbreadth & Lack of Clarity.

A permanent injunction "must not 'be more comprehensive or restrictive than justified by the pleadings, the evidence, and the usages of equity.'" *Holubec v. Brandenberger*, 111 S.W.3d 32, 39-40 (Tex. 2003) (quoting 6 L. Hamilton Lowe, TEXAS PRACTICE: REMEDIES § 244 at 237 (2d ed. 1973)). "Nor should a decree of injunction be so broad as to enjoin a defendant from activities which are a lawful and proper exercise of his rights." *Id.* (citing *Villalobos v. Holguin*, 146 Tex. 474, 208 S.W.2d 871, 875 (Tex. 1948). "Rather, 'injunctions must be narrowly drawn and precise.'" *Id.* (quoting *Brown v. Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir. 1992)).

The proposed injunction is hopelessly unclear and potentially enjoins lawful activities. Essentially, it enjoins the construction of the 21-story building as permitted. Like the jury's answer, the injunction does

not specify whether all of the design features of the proposed 21-story building are prohibited, or merely some of them, let alone specify which design features cannot be utilized. It does not even specify whether or not 21-stories are acceptable or prohibited. Since it speaks to the 21-story building only, it is unclear whether the injunction also applies to the 5-story garage (which was not included in the definition of "Project" in the Jury Charge).

III. Timing of the Lawsuit.

As is clear from the evidence, Plaintiffs have known about and opposed construction of this Project since September 2007, shortly after it was announced. By August 2009, the City of Houston approved a foundation permit substantially similar to the one at issue in this suit. It is undisputed that settlement with the City occurred in the first quarter of 2012. Nevertheless, Plaintiffs did not file this suit until May 1, 2013, after Defendant had already vacated the apartments and began its demolition process.

Plaintiffs' excuse for not suing earlier – that they did not have sufficient evidence until after receipt of documents from the Rule 202 proceeding – cannot withstand scrutiny. Plaintiffs, and everyone else who cared to check, knew that the building would be 21-stories high, that the building would give views into other neighbors' back yards, that the building would emit light,[3] that a 21-story building would cast a shadow, that the construction would include noise like any other building construction in Houston,[4] and that the increased density that would result from more residences would produce some increase in traffic.[5] For years, many residents have posted yellow signs condemning the Project as a "Tower of Traffic."

In fact, Mr. Grossman, a former President of Boulevard Oaks Civic Association, was the witness who claimed to be an expert on shadow and its effects on growing vegetation, including mushrooms and other fungi, and has always been available to communicate his opinions to the Plaintiffs. That a shadow

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[3] A claim never pled.

[4] Again, a claim never pled.

[5] The traffic limits were contained in the deed restrictions imposed by the City of Houston as part of the settlement agreement between the Developer and the City.

will be cast from a 21-story building is not something that Plaintiffs needed the plans and specifications to determine. Mr. Knesek, Plaintiffs' traffic engineer who was recruited by Mr. Grossman, was hired in 2012.[6] At least by the time that the Restrictive Covenants were filed in the real property records on March 13, 2012, he knew, or should have known, that the Project could not exceed a certain number of trips, and he should have been able to render his opinions as to the effect of that traffic.

The Plaintiffs' only claim which depended on review of plans and permits was the complaint about the Project foundation. Had the lawsuit been filed earlier, those plans and specification could have been the subject of a Request for Production months earlier, not just based upon a Rule 202 proceeding filed after Defendant had started vacating the property. Plaintiffs did not need market value data before filing suit – indeed, for reasons discussed, only the injunction suit was ripe anyway.

In summary, the evidence strongly suggests that the Plaintiffs and their anonymous organizers knew long before the filing date that a lawsuit would be forthcoming. Instead of starting the litigation earlier, Plaintiffs waited until they knew Defendant had vacated the apartments and were receiving no further rental income. Defendant does not waive its arguments that this suit is premature. Defendant would merely show that Plaintiffs' efforts have been directed and timed to try and stop the project. Consistent with their consistently expressed intentions, their timing is only explained by their continued attempts to inflict as much damage on Defendant as possible.

IV. Coming to the Nuisance.

Several of the prevailing Plaintiffs bought their properties in the face of public opposition to the Project – Meis (purchased home in August 2008 for $495,000), A. Bell (May 2011 - $650,000), Jennings (December 2011 - $515,000), Reusser (May 2012 - $727,500), and K. Bell (December 2012 - $495,000). Does that fact weigh in the balancing of the equities, and how?

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[6] *See*, Loughhead 11-25-13 Final Daily Copy, p. 122, lls. 2-3.

Clearly, coming to the nuisance, while not an absolute defense of right, is certainly a weight factor for balancing the equities. A plaintiff's equities are less weighty if he acquired his property with knowledge that the defendant's use of its property may later rise to the level of a nuisance. *See, e.g., Galveston, H. & S. A. R. Co. v. De Groff*, 102 Tex. 433, 118 S.W. 134 (1909). Therefore, as to these four prevailing Plaintiffs who bought their property in the face of the controversy, the Court has discretion to weigh that fact against the issuance of any injunction in their favor.

V. Public Harm & Harm to the Defendant.

During the March 31 hearing on balancing of the equities, the Defendant offered evidence of the following harms to itself and harms to the public if the Project were prohibited:

1. The Project will provide 232 high quality residences for persons who might desire to live in this specific area of the City. It will offer a housing option and live style that does not presently exist. The demographic profile of the prospective tenants of the Project will closely resemble the demographic profile of the surrounding neighborhood.

2. Construction of the building will add 2000 to 2800 jobs to Houston's economy.

3. By creating closer proximity between residences and places of employment in the inner city, the Project will shorten commutes and reduce traffic that would otherwise be forced to resort to freeways and other commuter arteries.

4. Based on a conservative valuation of $66,000,000, the Project owner will pay $1,700,000 in ad valorem taxes every year.

5. The Defendant has invested $14,733,945.11 in this Project, including architectural drawings, engineering work, entitlement costs, permitting fees, and other pursuit costs.

6. The requested injunction, if granted, is so vague that it would impose a cloud on the developability of the tract, which would significantly reduce the market value of the property.

7. To the extent the injunction were to necessitate a redesign of the Project, delay would be inevitable. Damages incurred due to delay of the Project will approximate $750,000.00 per month.

8. If not enjoined, the Project will generate $37,000,000 in net proceeds.

9. The proposed injunction will be perceived by the investing community as a harbinger of unpredictability.

In their brief, the Plaintiffs have argued that if the injunction is granted, the tract can be developed for something else that will yield a profit to the Defendant. However, they have not offered any proof of what development acceptable to the neighborhood could be profitable. Any substantially different development would already be upside down by $14,733,945. Millions more would be spent on new architectural designs, engineering costs, and permitting fees. A delay of a year could be expected, resulting in an approximate $9,000,000.00 ($750,000 x 12). The question of new lawsuits and complaints about new plans would create further unpredictability. A year of lost tax revenues to the public can be expected, and the new project, being something other than the best and highest use, would generate less taxable value than the current Project in the long run.

By way of comparing the equities, if the proposed injunction in this case were granted, the Developer and public stand to lose millions in sunk costs, millions more in tax revenues, millions in lost profits, and lose the benefit of additional high-quality residential space for persons who desire to live near the Medical Center, Rice University, and Hermann Park. If the injunction were denied, the Plaintiffs will be forced to endure construction noise as they will with any Project. However, the Project will provide amenities to the neighborhood, such as the plaza; and the feared harms of foundation damage, garage lighting, and peeping over the parapet of the amenity deck will be neutralized by the Developer's recent modifications to its original plans.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 17, 2014, a true and correct copy of the foregoing was forwarded to all counsel of record via hand delivery to the following:

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Via Facsimile 713-485-7250

/s/ H. Fred Cook
H. Fred Cook

WCG
Wilson, Cribbs & Goren, P.C.
Attorneys at Law

April 21, 2014

Hon. Judge Wilson
157th Judicial District Court
201 Caroline St.
Houston, Texas 77002

Re: Cause No. 2013-26155; Penelope Loughhead, et al v. Buckhead Investment Partners, Inc., et al; In the 157th Judicial District Court of Harris County, Texas

Dear Judge Wilson:

As Mr. Kirton testified at the March 31, 2014 hearing, Defendant will proceed to build the building with the following changes:

1. The augercast piles under the two large pile caps near the southwest and southeast corners of the property, 71 in total, will be bored deeper to 112 feet to tip in to the sand level under the property which exists at, according to Defendant's Exhibit 142, 110 feet;

2. Defendant will install architectural screening in the openings of the garage along the south and east sides thereof similar to that shown on the Moran Center Garage at the University of St. Thomas as illustrated in Defendant's Exhibit 165; and

3. Defendant will install landscape planters of sufficient width along the edges of the amenity deck which will preclude any views from the amenity deck into any of the Plaintiffs' yards abutting the site.

Defendant does not oppose denial of a permanent injunction expressly subject to Defendant's making these three changes.

Defendant's counsel believes that the case which was referred to by both counsel at the end of the argument was *Sonwalkar v. St. Luke's Sugar Land Partnership,LLP,* 374 S.W. 3d 186 (Tex. App. – Houston [1st Dist.] 2012, no pet.) (Section 65.001 of the Civil Practices & Remedies Code "'did not abolish the requirement of a showing of irreparable injury'") (quoting *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex. 2001)). Defendant is in the process of reviewing this case and may respond with other cases later today.

I hope the foregoing is helpful. If you have any questions or comments regarding these matters, please do not hesitate to contact me.

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Respectfully submitted,

H. Fred Cook

HFC/pb
G:\Clients\6427\013\Judge Wilson ltr-2.doc

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April 22, 2014

Hon. Randy Wilson
157th District Court
201 Caroline St.
Houston, Texas 77002

Re: No. 2013-26155; *Penelope Loughhead, et al v. 1717 Bissonnet, LLC*; In the 157th Judicial District of Harris County, Texas

Dear Judge Wilson:

In their post-trial letter brief of April 21, 2014, the Plaintiffs have cited five cases which they read to hold that a permanent nuisance is categorically a nuisance for which damages can never be an adequate remedy, and therefore, they conclude, the fact that a damage remedy can fully compensate them for permanent injuries of the types they have alleged is immaterial to the question of whether an injunction should be granted now.

The Defendant will respond to that contention.

In *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004), homeowner plaintiffs sued various of the industries located along the Houston Ship Channel complaining of permanent, recurrent nuisance conditions caused by the industries – smoke, soot, etc. In the opinion, the Court restated the long-settled rule of "injunction law" that injunctions can only be issued where a legal remedy is inadequate:

> A permanent injunction issues **only if** a party does not have an **adequate legal remedy**. If there is a legal remedy (normally monetary damages), then a party cannot get an injunction too. **Accordingly, awarding both an injunction and damages as to future effects would constitute a double recovery.**

Id. at 284 (emphasis added; footnote deleted) (citing *Town of Palm Valley v. Johnson*, 87 S.W. 3d 110, 111 (Tex. 2001) (per curiam)).

The Court's recognition that damages and injunctive relief would constitute a "double recovery" is implicit recognition that the two remedies produce an equivalent form of relief – the injunction ends the nuisance; damages compensate the plaintiff for the burden placed on the land.

The *Schneider* Court also reaffirmed that market value damages could, hypothetically, compensate the plaintiff for "all losses" from a permanent nuisance injury:

> [T]he distinction between temporary and permanent nuisances determines the damages that may be recovered. It has long been the rule in Texas that if a nuisance is temporary, the landowner may recover only lost use and enjoyment (measured in terms of rental value) that has already accrued. **Conversely, if a nuisance is permanent, the owner may recover lost market value - a figure that reflects all losses from the injury, including lost rents expected in the future**. Because the one claim is included in the other, the two claims are mutually exclusive; a landowner cannot recover both in the same action.

Id. (footnotes deleted).

In the *Schneider* opinion, the Court also states as follows:

> If only private interests are involved, courts may well favor the equitable option allowing neighboring owners to stop the uninvited nuisance, rather than the legal option forcing them to live with it and sending them a check.

Id. at 290 (footnote omitted). In support of this proposition, the Court cited *Lamb v. Kinslow*, 256 S.W.2d 903, 905 (Tex. Civ. App.—Waco 1953, writ ref'd n. r. e.), as "holding [that an] injunction could issue against permanent nuisance involving burning cotton burrs near plaintiff's home regardless of availability of legal remedy." *Schneider,* 147 S.W.3d at 290 n.135.

How does one reconcile the *Schneider* Court's statement, in one part of the opinion, that "[a] permanent injunction issues only if a party does not have an adequate legal remedy," with the Court's statement later on in the opinion that "courts may well favor the equitable option allowing neighboring owners to stop the uninvited nuisance, rather than the legal option forcing them to live with it and sending them a check"?

There are various ways to reconcile these apparently conflicting statements.

One is to ask whether the legal remedy is "adequate." The first proposition in *Schneider* refers to the requirement of an "adequate" legal remedy, whereas the second proposition refers to merely a legal remedy without reference to its adequacy. Equity recognizes that not all legal remedies are "adequate" to protect against certain types of harm.[1]

Another approach is to consider the adequacy of legal remedies as merely one of many factors to be considered in weighing the equities. *See, e.g., McAfee MX v. Foster*, No. 02-07-00080-CV, 2008 Tex. App. LEXIS 968, at *8 (Tex. App.—Fort Worth Feb. 7, 2008, pet. denied) ("Public convenience or necessity, economic burden to the defendant, and the adequacy of a legal remedy may affect this balance [of the equities]."); *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994)("equity jurisdiction does not rise or fall solely on the basis of the adequacy of their remedy at law"); *see also* RESTATEMENT (2d) OF TORTS § 944.

The *Lamb* case cited by *Schneider* involved a "recurring injury," but the it was the nature of the recurring injury that made a damage remedy inadequate, not the mere fact that the injury would recur. "Monetary damages are not always an adequate remedy in situations where the nuisance is of a recurring nature because damages could be recovered only as of the time of the bringing of the action, and a multiplicity of suits would be necessary." *Holubec v. Brandenberger*, 214 S.W.3d 650, 656 (Tex. App.—Austin 2006, no pet.). However, where, as here, the injury is of the type that damages for lost market value will compensate the plaintiff for the impairment of use and enjoyment of the property that does not deprive the property of its fundamental character as a home, then market damages are adequate compensation for a permanent nuisance.

In this case, by contrast, as the Plaintiffs have already forecast, the injunction they have requested will spawn many more rounds of nuisance litigation (either in the form of contempt proceedings or new suits) over whether alternative plans (some of which are already being proposed) will be acceptable. According to the Supreme Court in *Schneider*, "[j]udges may hesitate to issue discretionary orders that require extensive oversight." 147 S.W.3d at 287. "Difficulties in drafting or enforcing an injunction may discourage the trial judge from considering the imposition of an equitable remedy well before a final decision has to be made." *Id.* at 289. The multiplicity of suits will not result from the inadequacy of a suit for damages (if, as and when it becomes ripe) but from the issuance of the vague, overly broad decree that the Plaintiffs urge this Court to sign and monitor.

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[1] *See, e.g., State v. Logue*, 376 S.W.2d 567, 570 & 572 (Tex. 1964) ("It is the adequacy of the remedy at law that marks off the limitations as well as the jurisdiction of equitable relief . . . . The requirement of property rights being affected is related to adequacy of remedy at law . . . ."); *Sumner v. Crawford*, 91 Tex. 129, 41 S.W. 994, 995 (Tex. 1897) ("It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the end of justice and its prompt administration as the remedy in equity.") (internal quotations deleted).

In each of the five recurring injury cases cited by the Plaintiffs, damages were incapable of remedying the specific harm involved:

> * *Lamb v. Hall* — this is a smoke pollution case where the burning operations on the defendant's land created health problems for the plaintiffs. Where a permanent nuisance creates a permanent health risk, obviously market value damages cannot fully compensate the plaintiffs for a continuing personal injury.
>
> *Holubec v. Brandenberger* — "the nuisance created by the appellants was severe enough to require the Brandenbergers to move out of their home." This type of injury cannot be adequately compensated by damages, because a place of residence is unique and a nuisance that forces the plaintiff to move indefinitely from his established place of residence cannot be fully compensated with damages.
>
> * *Hall v. Seal* – was an unusual case where the defendant was engaged in a campaign of purposefully harassing the plaintiffs. The proof showed that the defendant was building a barn in close proximity to the plaintiff's property in order to use that facility as a launching pad for continued hostilities. The defendant refused to stop the harassment without a court order.
>
> * *Hot Rod Hill Motor Park v. Triolo* – this was a case where the plaintiff homeowner was subjected to 90-decibel noise pollution caused by vehicle engines roaring regularly at the defendant's nearby racetrack. Like the smoke pollution in *Lamb*, the deafening noise in *Hot Rod* is a nuisance of the type that will cause personal injury. Also, like the plaintiff in *Holubec*, the nuisance in *Hot Rod* was so severe that the plaintiff could not "remain in his home if the track remains open."
>
> * *Etan Industries, Inc. v. Lehmann*, 308 S.W.3d 489 (Tex. App.—Austin 2010), *rev'd*, 359 S.W.3d 220 (2011) – is a trespass case. Trespass is a different tort, where the injunction is used to vindicate the right to exclusive possession. In their letter brief, the Plaintiffs omitted to point out that appeals court decision they have relied upon was reversed by the Supreme Court and judgment rendered for the defendant. The case is therefore of doubtful authority on questions relating to the validity of the injunction granted.

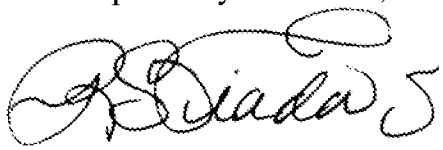
All of these cases are easily distinguishable on the facts. In this present *Loughhead* case, there is no evidence that the prospective nuisance, as found by the jury, will inflict any personal injury on any of the Plaintiffs. There is no evidence that the prospective nuisance will create any disturbances so severe that a person of ordinary sensibilities would feel forced to move out. There is no evidence that the building is being built as a staging ground to harass

the Plaintiffs, where the Defendant has promised not to stop the harassment unless restrained by the Court. Nor is there any claim of any imminent trespass in this case.

In their letter brief, the Plaintiffs continue to treat the jury's verdict as a declaration by the fact finder that each and every one of the alleged nuisance impacts tried will in fact be a nuisance. The Defendant, by careful analysis of the jury verdict, has shown the fallacies of that argument, and all of the fallacies won't be rehashed here. Clearly, the main problem for the jury is the foundation. In light of the verdict, the Defendant will modify the design of the foundation to prevent any compression subsidence and foundation damage on neighboring properties. The remaining problems reflected by the jury's verdict are small – 3% to 5% lost market value for prevailing properties outside of the zone of potential foundation damage, where there is nothing to threaten the homes with some danger to health or safety for the occupants or to otherwise render the homes uninhabitable. To the extent the jury verdict was based on perceived concerns with the garage lighting or vantage points, the Defendant will further mitigate those impacts by adding screening to the Project garage to substantially reduce any spill lighting, and by adding planters to the perimeter of the sixth floor amenity deck, to prevent users of the amenity deck from looking over the parapet and into backyards of the adjoining properties. To the extent the jury was concerned with construction noise, that is not a recurring problem at all – indeed, construction noise occurs regularly in big cities like Houston; it is inevitable if the tract is to be developed, and it is regulated by city ordinance.

Accordingly, the Defendant again requests that any injunction be denied.

Respectfully submitted,



Ramon G. Viada

RGV/jrh

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WCG
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Attorneys at Law

April 23, 2014

Hon. Judge Wilson
157th Judicial District Court
201 Caroline St.
Houston, Texas 77002

Re: Cause No. 2013-26155; Penelope Loughhead, et al v. Buckhead Investment Partners, Inc., et al; In the 157th Judicial District Court of Harris County, Texas

Dear Judge Wilson:

Defendant submits the following letter brief in response to the April 22, 2014, letter brief submitted by Plaintiffs.

Plaintiffs' first two points about the legality of the permits obtained by Defendant are nothing more than a rehash of Monday's closing argument. Basically, Plaintiffs rely on several pages of email, out of over 53,000 pages of documents produced, and use out-of-context distortion and innuendo to draw conclusions that are wholly unsubstantiated in light of the totality of the evidence from the trial, including Defendant's own testimony. There has been no pleading, and certainly no evidence, to support Plaintiffs' recent claim that the permits that were finally obtained are somehow invalid. In fact, Mr. Feldman's letter recently filed on behalf of the City of Houston evidences quite the contrary.

Plaintiffs' third claim about alleged limitations of the *amici* submissions misses the point. The submissions clearly point out, as did Mr. Sapp's testimony, that the effect of allowing injunctions against fully entitled and permitted projects will be to increase the development risk and uncertainty associated with them, which in turn will adversely affect the ability to obtain debt and equity financing for them, thereby deterring future development in Houston in favor of alternate markets. While no specific examples are cited, the fact that another nuisance lawsuit has already been filed against the developer of another high rise project in Houston demonstrates that allowing an injunction in this instance will undermine existing regulatory code governing such things as land use, development, traffic, noise, subdivisions and project planning and permitting, and will have a negative public impact on the overall Houston economy.

As for Plaintiffs' fourth bullet, it is not as cut and dried as Plaintiffs claim. The reality is that the jury found that the project as proposed at the time of trial would not impact 10 Plaintiffs' properties so as to rise to the level of being a prospective nuisance. And in any event, this is not an issue about "chilling effect" to allow homeowners to stand up for property rights, but instead an attempt to create a new body of law allowing parties to use nuisance suits as a means to circumvent existing processes and procedures set up by the City of Houston to regulate and permit such projects.

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Plaintiffs' fifth point claims that this project will affect more than their own neighborhood, but there has been no evidence to this effect or that any Plaintiff has any interest in opposing similar development in neighborhoods other than their own, despite the fact that similar projects are being constructed near low-rise residential areas throughout urban Houston. Further, the fact that the jury chose not to find a prospective nuisance as to the Plaintiffs who were more distant from the project demonstrates that the purported effect on the 140 plus interested persons and properties is not a conclusion that was shared by the jury.

Plaintiffs' sixth point ignores the fact that Plaintiffs' requested charge created the instant dilemma. Because Plaintiffs' opposed granulation of the charge, we are left to guess or surmise which impacts the jury considered important. The geographic distribution of Plaintiffs who received and did not receive prospective nuisance findings suggests that the jury was concerned with the very effects for which Defendant has offered mitigation that will entirely preclude them. Defendant has presented evidence that extending certain piles into the sand level at 110 feet will eliminate the propensity for any settlement predicted by Plaintiffs' expert; Defendant has agreed to further mitigate potential garage light emissions; and Defendant will install continuous planters on the amenity deck to preclude the possibility of peeping into abutting neighbors' yards.

Plaintiffs' last point ignores the fact that Plaintiffs' ability to recover damages is based upon the validity of the relief for which Plaintiffs' prayed. If, as Defendant has argued, this case is premature, that is not Defendant's fault. Plaintiffs chose when to file this suit and obtained the charge they preferred. Any defect in timing was caused by Plaintiffs' choices and requests for relief. Any litigant has the right to appeal a damage award. That does not make the damage award an inadequate remedy. Further, Plaintiffs have testified more than once, and their counsel has made it clear, that their goal is to stop the project rather than to receive money damages. Plaintiffs spent days both prior to and during trial attempting to prove alleged monetary damages. To change course now and disavow the damages as an adequate remedy, presumably because the amount awarded to the Plaintiffs was so small compared to the amount initially sought, should not be permitted.

Respectfully submitted,

H. Fred Cook

HFC/pb
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Zoning and Land Use Planning

Michael Lewyn[*]

Is an Apartment a Nuisance?

I. Introduction

In the recent case of Loughead v. Buckhead Investment Partners, a group of Houston, Texas homeowners filed suit to exclude an apartment building from their neighborhood.[1] Because Houston has no zoning, the plaintiffs claimed that the building was a common law nuisance.[2] In December 2013, the plaintiffs received damages from a jury; the defendants will appeal the verdict.[3]

The question of whether multifamily housing near single-family housing may constitute a nuisance one of first impression, but if the Loughead verdict is upheld on appeal, neighborhood activists may seek to raise such nuisance claims even in cities with zoning.[4]

The purpose of this article is to argue that such claims should generally not be allowed to go to a jury. After describing the background of nuisance law and of the Loughead litigation, I assert that the public interest in favor of affordable

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[1]See Plaintiffs' Original Petition, Loughhead v. Buckhead Investment Partners, at http://stopashbyhighrise.org/site/wp-content/uploads/2013/06/1-Plaintiffs__Original__Petition.pdf ("Complaint").

[2]*Id.*, sec. VI; Erin Mulvaney, *Jury weighs fate of Ashby high-rise*, at http://www.houstonchronicle.com/business/real-estate/article/Jury-weighs-fate-of-Ashby-high-rise-5070278.php?t=34cdeebc7e7b6b599e.

[3]*See* Erin Mulvaney, *Jury awards $1.7 million to residents in Ashby case*, at https://www.youtube.com/watch?v=VdGHm5lEjzE.

[4]I note in passing that something permitted by zoning can still be an actionable nuisance. *See* 7 Stuart M. Speiser, Charles F. Krause, and Alfred W. Gans, The American Law of Torts, sec. 20.25 at 230 (2011) ("A defendant's compliance with a zoning ordinance may be a factor in determining whether the conduct is a nuisance, but it is not determinative."). Thus, nuisance actions may succeed even in cities with zoning, and even if the defendant's conduct complies with zoning.

housing and walkable, transit-friendly infill development supports rejection of such claims. In addition, I argue that even if neighborhood concerns should be weighed against these broader public interests, those concerns should be raised through the zoning process rather than through jury trials.

II. Factual and Legal Background

Nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land."[5] Traditionally, a nuisance existed whenever a person used their land in a manner that caused substantial harm to another possessor of land.[6] For example, if a farm creates odors that offend its neighbors, the neighbors can sue for an injunction to stop the odors.[7]

As industrialization increased the number of polluting land uses, courts tried to accommodate industry by requiring that only "unreasonable" land uses be treated as nuisances.[8] Thus, petty annoyances may not constitute a nuisance.[9] More recently, some courts have held that in determining whether a defendant's land use is unreasonable, courts should weigh the gravity of the harm caused by an alleged nuisance against the social utility of the defendant's conduct.[10] Nuisance suits generally involve allegations that defendant has caused unreasonable odor, pollution or noise.[11]

A. Factual Background of Loughead

In 2007, a group of developers announced that they planned to build a high-rise building near the Boulevard Oaks Historic District in Houston, Texas,[12] a wealthy historic

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[5]Restatement (Second) of Torts, sec. 821D.

[6]*See* John G. Sprankling, Understanding Property Law, sec. 29.03 at 487 (2007).

[7]*Id.*

[8]*Id.* at 487–88.

[9]*Id.*, sec. 29.04[D] at 492.

[10]*Id.* at 488.

[11]*See* Speiser et. al., *supra* note 4, sec. 20.10-11 (devoting one section of nuisance discussion to noise pollution alone, and another to gases, smoke, dust, odors, vibration and light pollution).

[12]*See* Plaintiffs' Original Petition, Loughhead v. Buckhead Investment Partners, paras. 8–10 (naming developers and noting that their intentions "became public in 2007"), at http://stopashbyhighrise.org/site/w

district dominated by single-family houses.[13] Neighborhood residents vigorously opposed the project, primarily because of concerns about traffic.[14]

In response to neighborhood opposition, the city delayed the project for two years.[15] However, the city could not reject the project merely because of its alleged incompatibility with the surrounding neighborhood, because Houston has no zoning code to separate houses from multifamily dwellings.[16]

Instead, the city's Public Works Department denied the developers a permit to build a driveway, on the ground that the project would create too much traffic.[17] The developer then agreed to scale back the project by eliminating all the project's commercial uses, and by reducing the number of apartments in the building.[18] The Public Works Department then granted the permit, but was reversed by an appellate panel made up of city employees.[19] The developers then filed suit, and the city settled the case by agreeing to grant the permit if the developers reduced the number of stories from 23 to 21, and made certain other concessions in order to reduce traffic.[20]

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p-content/uploads/2013/06/1-Plaintiffs__Original__Petition.pdf ("Complaint").

[13]See City of Houston Planning & Development Department, *Historic Preservation Manual, Boulevard Oaks*, at http://www.houstontx.gov/planning/HistoricPres/HistoricPreservationManual/historic__districts/boulevard__oaks__arch.html (describing houses and their architectural styles); *See* John Mixon, *Four Land Use Vignettes From Unzoned(?) Houston*, 24 Notre Dame J. L. Ethics & Public Policy 159, 166 (2010) (describing project as 23 stories) (describing Boulevard Oaks and nearby Southhampton as "wealthy" residential areas).

[14]*Id.* at 169 ("Yellow signs opposing the 'Tower of Traffic' sprouted on virtually every yard within a mile of the Ashby site."). In addition, some homeowners raised concerns over privacy and shadows from the high rise. *Id.*

[15]*Id.*

[16]*Id.*

[17]*Id.* at 171.

[18]*Id.* (describing developer's decision to make property solely residential and to reduce number of units).

[19]*Id.*

[20]*See* Caroline Evans, "This is Not Over," Stop Ashby Organizers vow lawsuit, picket lines at packed strategy meeting, Examiner, April 26, 2012, at http://www.yourhoustonnews.com/bellaire/news/this-is-not-over-stop-ashby-organizers-vow-lawsuit-picket/article__56b626dc-58fe-512b-903a-41854dcc2824.html (describing settlement).

The homeowners responded by filing a suit for common-law nuisance in May 2013. The plaintiffs alleged that the high-rise would unreasonably interfere with their property because it would be "abnormal and out of place in its surroundings".[21] In addition, the building would allegedly reduce the plaintiffs' privacy by "providing direct views into Plaintiffs' backyards and causing gross invasions of privacy, depriving their properties of rain and sunlight thereby damaging their plants and other vegetation, diverting traffic onto their small residential streets, and causing substantial additional congestion at the intersections they use for ingress and egress."[22]

At a hearing held in June 2013, a trial court decided that plaintiffs' case could go to a jury, based on Texas nuisance case law.[23] At trial, as noted above, the jury awarded damages to the plaintiff, and the developers appealed.[24]

C. Case Law On Point?

Plaintiffs' claim that an apartment building near a house can be a nuisance was not entirely without legal support. In 1926, the Supreme Court, in a decision upholding the constitutionality of zoning, wrote that an apartment houses in a neighborhood of houses "come very near to being nuisances."[25] However, the Court did not state that apartment buildings *were* nuisances, and in any event this statement was dicta because the decision addressed the constitutionality of zoning rather than a common law nuisance claim.

The most relevant case relied upon by plaintiffs was Spiller v. Lyons.[26] In Spiller, a group of homeowners alleged that a motel created a nuisance.[27] A Texas appellate court upheld a jury verdict for the plaintiffs, partially because the motel

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[21]Complaint, para. 34.

[22]*Id.*, para. 35. The plaintiffs also claimed that the foundation of the high-rise would somehow damage the plaintiffs' foundations. *Id.*

[23]*See* Hearing on Defendant's Motion for Special Exceptions, District Court for Harris County, Texas 27, at http://stopashbyhighrise.org/site/wp-content/uploads/2013/06/Transcript-06-06-13-Hearing-on-Defs-Motion-for-Special-Exceptions.pdf ("I'm going to allow the plaintiff's pleadings to stand . . .. As I read the cases, I agree it appears there is no question but that I have [discretion to grant either an injunction or damages].")

[24]*See supra* note 3.

[25]Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 383, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926).

[26]Spiller v. Lyons, 737 S.W.2d 29 (Tex. App. Houston 14th Dist. 1987).

[27]*Id.* at 30.

violated restrictive covenants affecting the land,[28] but also because "the increased traffic would be a danger to children walking to and from nearby schools . . . and the influx of strangers and transients would be an offense to normal sensibilities."[29] The court also stated without any explanation that "the present water and sewage services were already strained and that operation of a motel would further impair those services."[30]

Although the motel residents in Spiller would presumably have been somewhat more transient than apartment residents, some of the arguments raised by the Spiller court could apply in any case involving additional housing. Nearly any new residential development will bring additional people to a neighborhood, some of whom will be driving automobiles. Thus, the "increased traffic" argument raised by the Spiller court might make any residential development a nuisance. Since new residents of a neighborhood are by definition "strangers" at first, the court's suggestion that "strangers and transients" create a nuisance might also justify finding that new housing is equally problematic. And new residents may also increase the demand for infrastructure, as in the Spiller case.

On the other hand, at least one other court has rejected a similar claim. In California Tahoe Regional Planning Agency v. Jenkins,[31] a regional planning agency and the state of California claimed that high-rise hotel-casinos near Lake Tahoe were a nuisance[32] because they would attract "more people and cars"[33] to the area, thus harming the regional environment.[34] The U.S. Court of Appeals for the Ninth Circuit rejected the claim, stating: "not every threatened

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[28] *Id.*

[29] *Id.*

[30] *Id.* Plaintiffs also cited numerous other nuisance cases that did not involve housing. See Pool v. River Bend Ranch, LLC, 346 S.W.3d 853 (Tex. App. Tyler 2011) (all terrain vehicle park a nuisance); GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet, 61 S.W.3d 599 (Tex. App. Houston 14th Dist. 2001) (cellular telephone tower a nuisance); Champion Forest Baptist Church v. Rowe, 1987 WL 5188 (Tex. App. Houston 1st Dist. 1987) (upholding trial court decision that church parking garage a nuisance).

[31] California Tahoe Regional Planning Agency v. Jennings, 594 F.2d 181, 9 Envtl. L. Rep. 20131 (9th Cir. 1979).

[32] *Id.* at 184.

[33] *Id.* at 193.

[34] *Id.* at 194.

injury can be enjoined as a potential nuisance. The line is not a bright one, but we cannot consider high rise hotels and their occupants as indistinguishable from untreated sewage, noxious gases, and poisonous pesticides."[35] Thus, California Tahoe suggests that residential development is so different from traditional nuisances that it should generally not be treated as a nuisance.

In sum, existing case law is divided as to the reach of nuisance law. No case directly addresses whether apartments or condominiums near single-family housing is a nuisance, and case law is divided as to whether hotels and motels in such areas should be treated as nuisances.

III. Policy

Given that case law is ambiguous, courts have ample discretion to decide whether residential development that differs from its neighbors can be a nuisance. At least three public policies support a per se rule that buildings that are taller or more densely developed than their neighbors should not be treated as nuisances: the public policy in favor of additional rental housing, the public policy in favor of more pedestrian-friendly infill development, and the public policy in favor of orderly zoning and planning.

A. More housing

Throughout the United States, there is a rental housing shortage. Between 2000 and 2014, median household income has increased by 25.4%, while rent has increased by 52.8%.[36] Nationally, the percentage of renters paying more than 30% of their income from housing jumped from 38% in 2000 to 50% in 2010.[37] 27% of renters (including 71% of renters earning under $15,000) now pay more than half their incomes in rent.[38] The explosion in rental costs has not been limited to traditionally high-cost cities such as New York. For example,

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[35] *Id.*

[36] *See* Krishna Rao, *The Rent is Too Damn High*, at http://www.zillow.com/research/rent-affordability-2013q4-6681.

[37] *See* Annie Lowrey, With Rental Demand Soaring, Poor are Feeling Squeezed, New York Times, Dec. 9, 2013, at http://www.nytimes.com/2013/12/10/business/economy/the-poor-are-squeezed-as-rental-housing-demand-soars.html?pagewanted=all&_r=0.

[38] Joint Center for Housing Studies, *State of the Nation's Housing* 38 (2014) at http://www.jchs.harvard.edu/research/publications/state-nations-housing-2014 ("State").

in Hattiesburg, Mississippi, rents increased from 20% of household income in 1979 to 35.2% in 2013.[39]

This shortage is in part a result of increased demand for rental property; the post-2008 economic downturn has meant that fewer renters can afford to purchase houses, while tighter credit standards have forced would-be homebuyers to rent.[40] Moreover, the supply of rental housing has not kept up with demand. Although the number of multifamily housing starts in 2013 is higher than it was at the start of the economic downturn, it is still less than half the number of multifamily starts in 1985.[41] As a result, between 2006 and 2012, the supply of multifamily units increased by 1.6 million, while the number of renters increased by over 5 million.[42] In addition, 1.9 million rental units were demolished between 2001 and 2011; these units were disproportionately low-cost units.[43] As a result of these trends, the national rental vacancy rate (8.3%) is at its lowest point since 2000.[44]

If (as in the Houston case discussed above) homeowners are allowed to use nuisance law to keep multifamily housing out of their neighborhoods, the shortage of rental housing is likely to get worse. If would-be landlords can only build in places far from single-family homes, the possible supply of land available for multifamily housing will decrease, the number of new units will decrease, and rents will continue to rise.

In fact, the logic of Fisher may limit rental housing even in areas far away from single-family housing. If any increase in population means increased traffic, and increased traffic means nuisance, then there is no reason why only homeowners could use nuisance law to stop development. A commercial landowner could raise the same complaint, asserting that housing nearby could clog traffic and thus unreasonably interfere with the commutes of its employees and customers. Even a landlord seeking to limit competition could sue to stop nearby apartments on similar grounds.

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[39] *See* Rao, *supra* note 36.

[40] *See* Lowrey, *supra* note 37.

[41] *See* State, *supra* note 38, at 34 (307,000 starts in 2013, up from 109,000 in 2009, but far below 670,000 in 1985).

[42] *Id.* at 24. However, about 3 million single-family homes were rented out. *Id.*

[43] *Id.* at 25.

[44] *Id.* at 22–23.

B. Infill Development

Because most urban land is zoned for single-family housing, virtually all of urban America (except in the most densely populated cities) is near a group of single-family houses. In Houston, single-family housing takes up 67% of all land and 95% of all land used for housing.[45] One survey of 10 cities shows that Houston is only the sixth most house-dominated city out of 10 surveyed; even in Baltimore (the least house-dominated city surveyed) 49% of all land and 70% of residential land is used for houses.[46] Even a brief look at Baltimore streets will reveal that multifamily and commercial land is often concentrated on a few major streets, and that those streets are surrounded by streets full of single-family homes.[47]

It logically follows that if apartments near single-family homes were a nuisance, almost every new apartment building in the United States would be a nuisance. If apartments could be built at all, they could only be built in "greenfield" locations- that is, in exurban places far from existing development.[48]

But public policy favors building multifamily housing in existing urban neighborhoods and inner suburbs, especially if those neighborhoods are near downtown and/or densely developed. Existing neighborhoods near downtown tend to be less dependent on automobiles than greenfields, for two reasons. First, bus and rail networks are generally centered near downtown business districts,[49] so neighborhoods near downtowns tend to have the most convenient public transit

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[45]See Gordon Bonan, Ecological Climatology, CH. 14 at 24, at http://www.cgd.ucar.edu/tss/aboutus/staff/bonan/ecoclim/1sted/Chapter14.pdf (67% of city land used by single-family homes, 3% by multifamily housing, and 30% by commercial and industrial space).

[46]*Id.*

[47]*See generally* Google Maps, at *maps.google.com* (look at Baltimore, Md. and click on yellow icon to see individual streets).

[48]*See* Anne Marie Pippin, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central and Eastern Europe*, 37 Ga. J. Int'l & Comp. L. 589, 596 (2009) (greenfields are "pristine, undeveloped land typically located in low density suburban areas"); Andrea Wortzel, *Greening the Inner Cities: Can Federal Tax Incentives Solve the Brownfields Problem?*, 29 Urb. Law 309, 315 (1997) (greenfields are "undeveloped sites in suburban or rural locations").

[49]See Jon C. Teaford, The Metropolitan Revolution: The Rise of Post-Urban America 10 (2006) (historically, transit lines converged downtown, and as number of automobiles increased, "the prospects for downtown-

service and the highest transit ridership.[50] Second, compact neighborhoods tend to have higher transit ridership than thinly populated places; if only a few houses can be built on a block near public transit, only a few houses can access such transit.[51] Neighborhoods near downtown tend to be more compact, and thus can support more transit service.[52]

It follows that if new housing is built in existing neighborhoods near downtown, the residents of those neighborhoods will drive less than residents of greenfield sites, and will be more likely to walk, bike or use public transit. Where there is the case, both these new residents and the public as a whole benefit. Residents of transit-oriented neighborhoods benefit by being able to own fewer cars and by being able to use their existing cars less frequently, thus reducing household transportation budgets. For example, residents of Washington, D.C. spend $9461 per household on transportation, while the average household in Washington's outer suburbs spends $15,601 per household, and some suburbs have even higher transportation costs.[53] In addition, residents of transit-friendly places are able to get more exercise

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centered public transit worsened"); Anthony Downs, Still Stuck in Traffic: Coping with Peak Hour Traffic 252 (2004) (for example, in Los Angeles public transit "modal share" higher in downtown than in other employment centers).

[50]*See* Brian D. Taylor and Camille N.Y. Fink, *The Factors Influencing Transit Ridership: A Review and Analysis of the Ridership Literature*, at http://www.uctc.net/papers/681.pdf (citing studies showing that downtown "employment explains a very high percentage . . . of the number of transit commuters" and that downtown size one factor affecting ridership).

[51]*See* Joanna D. Malaczynski and Timothy P. Duane, *Reducing Greenhouse Gas Emissions from Vehicle Miles Traveled: Integrating the California Environmental Quality Act with the California Global Warming Solutions Act*, 36 ECOLOGY L.Q. 71, 80 n. 44 (2009) (raising average density to nine units per acre could reduce vehicle miles traveled by 30% nationwide); *See* Robert H. Freilich, *The Land Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 Urb. Law. 547, 552 & n. 18 (2009) (neighborhood must have at least seven units per acre to support regular transit service); Downs, *supra* note 49, at 210 (seven units per acre supports bus service once every half-hour); Jed Kolko, *Making the Most of Transit: Density, Employment Growth, and Ridership Around New Stations* 16, at http://www.ppic.org/main/publication.asp?i=947 ("transit ridership falls considerably at distances beyond just one quarter-mile from a transit station").

[52]*Id.* at 8 ("the density of both population and employment typically declines with increasing distance from downtown").

[53]*See* Urban Land Institute, *Beltway Burden* 4–5, at http://www.cnt.org/repository/BeltwayBurden.pdf (listing costs for various jurisdictions,

as part of their daily lives by walking to and from bus and train stops, and are thus, other things being equal, likely to be in better health.[54] The public as a whole benefits from reduced traffic congestion (because higher transit ridership means fewer cars on the roads) and also from reduced pollution (because fewer cars on the roads means less pollution and fewer greenhouse gas emisssions). According to one study, more compact development could reduce vehicle miles traveled by 20–40%, which in turn would reduce total transportation-related carbon dioxide emissions by 7–10% by 2050.[55]

C. Inconsistency with the Purposes of Zoning and Planning

One purpose of zoning is to allow cities to create an orderly plan of development for the benefit of the entire city, as opposed to just one landowner or group of landowners.[56] So if a particular land use is necessary but unpopular, the city should zone for that use- for example, by spreading it throughout the city so that all neighborhoods feel the pain arising from such land uses, or by concentrating it in an area where it will harm no one.

But if anyone harmed by an unpopular use can file suit for nuisance, the location of unpopular uses will be determined not by citywide give-and-take, but by whoever has the best

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and adding that the most expensive suburb is Fauquier County, Virginia, where an average transportation cost of $17,996 makes the combined cost of housing and transportation more than 25% more than the region's central jurisdictions). *Cf.* Urban Land Institute, *Bay Area Burden* 6–7 at http://www.cnt.org/repository/Bay-Area-Burden_FINAL_lowres.pdf (showing similar results for metropolitan San Francisco cities and suburbs, despite that region's higher housing costs).

[54]See Vanessa Russell-Evans and Carl S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and its Impact on Obesity, How the Adoption of Smart Growth Statutes Can Help Build Healthier and More Active Communities*, 29 Va. Envtl. L.J. 63, 75–88 (2011) (summarizing evidence); Reid Ewing et. al., *Relationship between urban sprawl and physical activity, obesity and morbidity-Update and refinement*, at http://www.sciencedirect.com/science/article/pii/S135382921300172X.

[55]Reid Ewing et. al., *Growing Cooler: The Evidence on Urban Development and Climate Change* 9 at http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf.

[56]See Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 27, 586 P.2d 860, 866 (1978) ("the purpose of zoning is not to increase or decrease the value of any Particular lot or tract. Rather it is to benefit the Community generally by the intelligent planning of land uses . . . [and to] promote orderly growth and development").

lawyers. And if every neighborhood has adequate representation, the undesirable-but-necessary land use will have no place to go.[57]

III. Conclusion

The Loughead case may encourage homeowners to file nuisance suits in order to stop new residential development near their neighborhoods. Courts should reject such claims because the broader public interests in affordable housing and infill development favor more development in existing areas, not less development. Furthermore, disputes over when multifamily housing is compatible with other land uses should be raised in zoning proceedings, not in nuisance actions, because zoning authorities can weigh homeowners' interest in avoiding congestion and similar externalities against the citywide public interests discussed above.

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[57] Of course, this argument does not apply to Houston, which (as noted above) has no formal zoning. *See supra* note 2 and accompanying text. But it does apply elsewhere.